No. 14-1457

In the Supreme Court of the United States

BRANDON THOMAS BETTERMAN,
Petitioner,

v.

STATE OF MONTANA,
Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF MONTANA

JOINT APPENDIX

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Petition For Certiorari Filed June 10, 2015
Certiorari Granted December 4, 2015

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MONTANA SECOND JUDICIAL DISTRICT,
SILVER BOW COUNTY

No. DC-12-45

THE STATE OF MONTANA, PLAINTIFF,

v.

BRANDON THOMAS BETTERMAN, DEFENDANT.

RELEVANT DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
03/28/2012	1	State's application for leave to file an information by affidavit
03/30/2012	2	Criminal record transferred to the court
04/02/2012	3	Order granting leave to State to file information
04/02/2012	4	Information charging Defendant with bail jumping
04/02/2012	5	Order setting arraignment for April 19, 2012

DATE	NO.	PROCEEDINGS
04/16/2012	5.1	Letter to court from Defendant's father
04/19/2012	6	Minute entry reflecting Defendant's arraignment and guilty plea
04/19/2012	7	Defendant's acknowledgement of his waiver of certain constitutional rights in pleading guilty
04/19/2012	8	State's notice of its intent to designate Defendant a persistent felony offender
04/27/2012	9	Defendant's motion in opposition to, and to strike, the State's persistent felony offender notice
05/03/2012	10	Order for a pre-sentence investigation
05/10/2012	12	State's motion for an extension of time to respond to Defendant's persistent felony offender motion
05/11/2012	13	Order granting State's motion for extension of time
06/13/2012	15	State's opposition brief to Defendant's persistent felony offender motion
06/13/2012	16	Order setting "an all motions hearing" for June 28, 2012

DATE	NO.	PROCEEDINGS
06/28/2012	17	Minute entry reflecting oral argument on Defendant's persistent felony offender motion
11/27/2012	18	Order denying Defendant's persistent felony offender motion
12/28/2012	20	Order setting Defendant's sentencing for January 17, 2013
01/17/2013	22	Defendant's speedy trial motion filed
01/17/2013	23	Minute entry reflecting court's continuance of Defendant's sentencing
01/29/2013	24	State's opposition to Defendant's speedy trial motion filed
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03/05/2015	41	Remittitur from the Montana Supreme Court reflecting affirmance of decision below
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06/10/2015	43	Court's amended judgment
12/21/2015	45	Defendant's pre-sentence investigation added to record

SUPREME COURT OF MONTANA

No. DA 13-0572

THE STATE OF MONTANA, PLAINTIFF AND APPELLEE,

v.

BRANDON THOMAS BETTERMAN, DEFENDANT AND APPELLANT.

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
04/30/2014	Motion to Supplement Record on Appeal with Pre-Sentence Investigation
05/02/2014	Order granting Motion to Supplement Record on Appeal with Pre-Sentence Investigation
05/19/2014	Brief of Appellant
09/08/2014	Brief of Appellee
10/23/2014	Reply Brief of Appellant
02/10/2015	Opinion affirming judgment below

IN THE JUSTICE COURT IN AND FOR THE CITY AND COUNTY OF BUTTE-SILVER BOW, MONTANA, BEFORE JUDGE DEBRA D. WILLIAMS, JUSTICE OF THE PEACE

No. CR-2012-1133

STATE OF MONTANA,

Plaintiff,

v.

BRANDON THOMAS BETTERMAN,
4421 Lux Avenue
Billings, MT 59101,

Defendant.

March 5, 2012

COMPLAINT

DEPUTY COUNTY ATTORNEY, MARK THIESZEN, being duly sworn, deposes and says that probable cause exits to charge the Defendant, BRANDON THOMAS BETTERMAN with the following offense(s):

BAIL JUMPING, a felony, in violation of Section 45-7-308, MCA, 2011, in that it is alleged the on or about December 9, 2011, in the City of Butte, County of

Silver Bow, State of Montana, the Defendant, BRANDON THOMAS BETTERMAN, having been set at liberty by court order, upon condition that he will subsequently appear at a specified place and time, failed without lawful excuse to appear at the set time and place by failing to appear for his sentencing hearing.

Maximum Penalties: If convicted the Court could sentence the Defendant to the State Prison for a period not more than ten (10) years.

/s/ Mark Thieszen
Complainant

LIMITED COURT, STATE OF MONTANA
IN AND FOR THE COUNTY OF SILVER BOW
155 WEST GRANITE
BUTTE, MONTANA 59701

No. CR-2012-0001133

STATE OF MONTANA,

Plaintiff,

v.

BRANDON THOMAS BETTERMAN,

Defendant.

March 5, 2012

ORDER OF COMMITMENT

TO: THE SHERIFF OF BUTTE-SILVER BOW COUNTY, STATE OF MONTANA

THE ABOVE NAMED DEFENDANT HAS APPEARED IN THE ABOVE NAMED COURT OF THE CRIME:

Count I 45-7-308 Bail Jumping – Charged With A Felony

BOND: $10,000.00

IT IS THE ORDER OF THIS COURT THAT THE DEFENDANT BE COMMITTED TO YOUR CUSTODY AND DETAINED IN THE COUNTY JAIL FOR A PERIOD OF OR UNTIL HE/SHE IS LEGALLY DISCHARGED.

DATE: Monday, March 05, 2012

/s/ Debra D. Williams

JUSTICE OF THE PEACE DEBRA D. WILLIAMS

MONTANA SECOND JUDICIAL DISTRICT,
SILVER BOW COUNTY

No. DC-12-45

THE STATE OF MONTANA, PLAINTIFF,

v.

BRANDON THOMAS BETTERMAN, DEFENDANT.

March 28, 2012

APPLICATION FOR LEAVE TO FILE AN INFORMATION BY AFFIDAVIT

Mark Thieszen, Deputy County Attorney, being first duly sworn upon oath, deposes and states:

That I am a Deputy County Attorney for Butte-Silver Bow, Montana; that I request leave of the Second Judicial District Court to file an Information charging the Defendant, BRANDON THOMAS BETTERMAN with the criminal offense of BAIL JUMPING, a felony, in violation of § 45-7-308, MCA

(2011). The facts showing probable cause for the filing of the Information are set forth below.

On March 14, 2011, the Defendant, BRANDON THOMAS BETTERMAN was arrested for the offense of felony PARTNER OR FAMILY MEMBER ASSAULT. BETTERMAN posted a surety bond with AA Bail bonds. Prior to release, Justice of the Peace Debra Williams issued a Conditions of Release Order including the condition that the "Defendant must appear in Court each and every time he/she is required to, and must personally appear." Subsequently BETTERMAN appeared before the District Court where the Court continued the bond and conditions.

The Court ordered that the Defendant appear for sentencing on December 8, 2011. The Defendant did not appear for sentencing at that time. The Court reset sentencing for December 9, 2011, and the Defendant did not appear again. The Court issued a warrant for the Defendant's arrest.

On February 9, 2012, the Defendant turned himself in to the Butte-Silver Bow Detention Center.

In a letter dated February 27, 2012, addressed to Judge Krueger, the Defendant states that he knew he was due in Court on December 8 and then again on December 9, 2011, but that he could not make it to Court from his home in Billings. The Defendant states that the day after he did not show up for sentencing he panicked and began drinking heavily.

Based upon the facts set forth above, the Butte-Silver Bow County Attorney seeks leave of Court to charge the Defendant, BRANDON THOMAS BETTERMAN, with the criminal offense of BAIL JUMPING, a felony, in violation of§ 45-7-308, MCA.

DATED this 28 day of March, 2012

EILEEN JOYCE
COUNTY ATTORNEY

/s/ MARK THIESZEN
DEPUTY COUNTY ATTORNEY

MONTANA SECOND JUDICIAL DISTRICT,
SILVER BOW COUNTY

No. DC-12-45

THE STATE OF MONTANA, PLAINTIFF,

v.

BRANDON THOMAS BETTERMAN, DEFENDANT.

March 30, 2012.

ORDER

Upon reading the State's Application For Leave To File An Information By Affidavit, and the Court finding probable cause,

IT IS ORDERED that leave is granted to the Butte-Silver Bow County Attorney to file an Information charging the Defendant with the offense of BAIL JUMPING, a felony, in violation of § 45-7-308 MCA.

IT IS FURTHER ORDERED that the Defendant may be admitted to bail in the amount of

$10,000.

DATED this 30 day March, 2012.

/s/ Kurt Krueger
District Court Judge

MONTANA SECOND JUDICIAL DISTRICT,
SILVER BOW COUNTY

No. DC-12-45

THE STATE OF MONTANA, PLAINTIFF,

v.

BRANDON THOMAS BETTERMAN, DEFENDANT.

April 2, 2012.

INFORMATION

In the above-entitled Court on this 2nd day of April 2012, by leave of Court first had and obtained, BRANDON THOMAS BETTERMAN is accused by Eileen Joyce, County Attorney in and for the County of Silver Bow, State of Montana, by this Information of the Criminal offense of BAIL JUMPING, a felony, in violation of § 45-7-308, MCA, committed as follows:

That at 155 West Granite, Butte, Montana, in the City of Butte, County of Silver Bow, State of

Montana, on or about December 9, 2011, and before the filing of this Information, the Defendant, BRANDON THOMAS BETTERMAN, having been released on bond on the condition that he appear in Court as directed, purposely failed to appear in Court on December 9, 2011, without lawful excuse.

MAXIMUM PENALTY

If convicted, the Defendant shall be imprisoned in the State Prison for a term not to exceed ten (10) years.

EILEEN JOYCE
COUNTY ATTORNEY

/s/ MARK THIESZEN
DEPUTY COUNTY ATTORNEY

WITNESSES

The State intends to call the following witnesses to testify as to the allegations set forth in this Information:

Rep. of Butte-Silver Bow Detention Center

Rep. of 2nd Judicial District Clerk of Court

Butte, MT

MONTANA SECOND JUDICIAL DISTRICT,
SILVER BOW COUNTY

No. DC-12-45

THE STATE OF MONTANA, PLAINTIFF,

v.

BRANDON THOMAS BETTERMAN, DEFENDANT.

March 30, 2012.

ORDER

The State having filed an Information charging the Defendant with the criminal offense of BAIL JUMPING, a felony, in violation of § 45-7-308, MCA

IT IS ORDERED that the Defendant, BRANDON THOMAS BETTERMAN, shall on the 19th day of April, 2012, at 10:00 a.m., appear in the Second Judicial District Court before the Honorable Kurt Krueger for an arraignment in this matter.

DATED this 30th day of March 2012.

/s/ Kurt Krueger
District Court Judge

MONTANA SECOND JUDICIAL DISTRICT,
SILVER BOW COUNTY

No. DC-12-45

THE STATE OF MONTANA, PLAINTIFF,

v.

BRANDON THOMAS BETTERMAN, DEFENDANT.

April 19, 2012.

MINUTE ENTRY

KURT KRUEGER, Presiding Judge
CHRISTINE LIVELY, Court Reporter

This day this cause came on for arraignment. Deputy County Attorney Mark Thieszen, Esq. was present for the State of Montana; the Defendant was present with Counsel Francis P. McGee, Esq. Thereupon, the Court duly arraigned the Defendant,

who: answered his true name as stated in the Information, waived a reading of the Information and accepted a true copy thereof. Upon being asked by the Court as to his plea, the Defendant answered, "Guilty" to all counts on the Information.

Mr. Thieszen advised the Court that the State intends to seek a persistent felony offender designation of the Defendant, and Mr. McGee indicated that the Defendant would resist the same. The Court accepted the Defendant's guilty plea, ordered a pre-sentence investigation, and remanded the Defendant to the custody of the sheriff in lieu of Ten Thousand Dollars ($10,000.00) bail.

LAW OFFICES OF FRANCIS P. McGEE
125 West Granite Street
Suite 102 Silver Bow Center
Butte, MT 59701
Telephone: (406) 723-8770

Attorney for Defendant BETTERMAN

MONTANA SECOND JUDICIAL DISTRICT,
SILVER BOW COUNTY

No. DC-12-45

THE STATE OF MONTANA, PLAINTIFF,

v.

BRANDON THOMAS BETTERMAN, DEFENDANT.

April 19, 2012.

WAIVER OF CONSTITUTIONAL RIGHTS

Comes now the defendant, BRANDON THOMAS BETTERMAN, and acknowledges his constitutional rights and the premises of his plea as

follows:

In pleading guilty, I acknowledge that no promises have been made to me by my counsel, the County Attorney, the Court, or any member of law enforcement and that there is no agreement as to sentencing. I understand the maximum possible sentence for bail jumping in violation of Section 45-7-308 MCA is 10 years in the Montana State Prison. My plea is an open plea.

I understand that I have a Constitutional right to trial by a judge or by a jury. I understand that in a jury trial, all twelve jurors would have to agree as to my guilt or innocence (or that my guilt was not proved beyond a reasonable doubt). In other words, all the jurors would have to agree to find me either "guilty" or "not guilty," I understand that if I plead guilty to this charge, there will be no trial by judge or by jury and that I am giving up that right. I hereby give up my right to trial by judge or by jury. I also understand that I will be giving up the right to be found guilty of any lesser included offense at a trial, and I give up that right as well.

I understand that I have the right to subpoena witnesses to testify on my own behalf and force them to come to Court, appear and testify in my presence. I also understand that I have a right to present other types of evidence, such a physical evidence and expert testimony. I understand that if I plead guilty, I will be giving up these rights. I give up the right to subpoena witnesses to testify for me and to present any other type of evidence.

I understand that I have the right to confront and to cross-examine the witnesses against me. This means that the witnesses against me will have to come to Court and testify, under oath and in my presence and the presence of the judge and jury if I

have a jury trial, about the facts of my case. My attorney has the right to ask those witnesses questions and to test their testimony and its veracity. I hereby waive and give up my right to confront and to cross-examine witnesses.

I understand that I have a right and privilege against self-incrimination. This means that I cannot be forced to testify or to say anything against myself that would tend to prove that I am guilty of anything. In order to plead guilty, I understand that I must give up my right and privilege against self-incrimination. I hereby waive and give up that right.

I also understand that I have a right to testify on my own behalf. I understand that if I do that, my attorney will ask me questions and the county attorney or a deputy county attorney will have the opportunity to cross-examine me. I hereby waive and give up my right to testify on my own behalf.

I understand that in pleading guilty I am giving up my right to appeal my conviction to the Montana Supreme Court

I understand that I have the right to counsel. Attorney Francis P. (Frank) McGee has been appointed by the Office of the Montana State Public Defender to represent me in this action. I have met with him and he has discussed this matter at length with me. I am satisfied with his services. There are no communication problems between me and my attorney.

DATED: April 19, 2012.

/s/ BRANDON THOMAS BETTERMAN

CERTIFICATION OF COUNSEL

I, Francis P. McGee, do hereby certify that I

have counseled with the defendant BRANDON THOMAS BETTERMAN. I join in his waiver of Constitutional rights and I concur in the entry of his open plea.

I am convinced that he understands his Constitutional Rights and that his waiver of the same and his entry of a guilty plea is knowingly, understandingly and intelligently made and done.

DATED: April 19, 2012.

/s/ FRANCIS P. McGEE

MARK THIESZEN
DEPUTY COUNTY ATTORNEY
Butte-Silver Bow Courthouse
155 West Granite Street
Butte, Montana 59701
(406) 497-6230
Attorney for Plaintiff

MONTANA SECOND JUDICIAL DISTRICT,
SILVER BOW COUNTY

No. DC-12-45

THE STATE OF MONTANA, PLAINTIFF,

v.

BRANDON THOMAS BETTERMAN, DEFENDANT.

April 19, 2012.

NOTICE

TO: Defendant, BRANDON THOMAS BETTERMAN, and his counsel, Frank McGee,

Please be advised that the State of Montana intends to seek a designation of the above-named Defendant as a persistent felony offender upon conviction of the felony offense charged in the above-entitled action, pursuant to §§ 46-18-501, et seq., MCA. Section 46-18-501, MCA, provides in relevant part:

> A "persistent felony offender" is an offender who has previously been convicted of a felony and who is presently being sentenced for a second felony committed on a different occasion than the first. An offender is considered to have been previously convicted of a felony if:
>
> (1) the previous felony conviction was for an offense committed in this state or any other jurisdiction for which a sentence to a term of imprisonment in excess of one (1) year could have been imposed;
>
> (2) less than five (5) years have elapsed between the commission of the present offense and either:
>
> (a) the previous felony conviction; or
>
> (b) the offender's release on parole or otherwise from prison or other commitment imposed as a result of the previous felony conviction ...

The Defendant qualifies for treatment as a persistent offender pursuant to § 46-18-501 (1) and (2)(a), MCA. Specifically, the Defendant was convicted of the offenses of Partner Family Member Assault, and was sentenced on March 15, 2012, DC-11-36, Second Judicial District Court. Less than five years has elapsed between the alleged commission of the current offense and the Defendant's release from prior commitment and/or prior conviction. The prior conviction involved an offense for which a term of

imprisonment exceeding one year could have been imposed.

Accordingly, the State is entitled to request the Court to designate Defendant as a persistent felony offender and to enhance his sentence pursuant to § 46-18-502, MCA, upon conviction of a felony offense in this case. § 46-18-502, MCA, states that a person designated a persistent felony offender shall be imprisoned in the state prison for a term of not less than five (5) years or more than one-hundred (1 00) years, or shall be fined an amount not to exceed $50,000, or both. Pursuant to§ 46-13-108, MCA, this Notice has not been made public.

On April 19, 2012, the Defendant appeared before the Court with counsel and entered a plea of guilty to the bail-jumping offense charged in this case. The State had previously orally notified counsel for the Defendant that it intended to seek designation as a persistent felony offender. Section 46-18-108(1), MCA, states that "Except for good cause shown, if the prosecution seeks treatment of the accused as a persistent felony offender, notice of that fact must be given at or before the omnibus hearing pursuant to 46-13-110." This notice is being filed before the time of the omnibus, as it is filed the same day as the arraignment.

The Defendant seeks to avoid designation as a persistent felony offender by pleading guilty at the arraignment. However, such a maneuver is not a valid way to avoid the consequences of a persistent felony offender designation. The statute merely requires the State to provide notice to the Defendant prior to the omnibus so that the potential increase in penalties is not a surprise to the Defendant. Here, the Defendant was well aware of the potential

designation as a persistent felony offender; indeed, counsel for the Defendant informed the Court during the arraignment that the Defendant was pleading guilty to avoid such designation. Thus the Defendant cannot claim he did not have notice of the potential to be sentenced as a persistent felony offender. Rushing to plead guilty in order to avoid designation as a persistent felony offender while claiming an unawareness of the possibility of such designation does not comport with the purposes of the persistent felony offender statutes. If the notice was required before any entry of plea was made the statute would state that the notice must be made before the arraignment, however, it states the notice must be given at or before the omnibus hearing, unless good cause is shown to provide it later.

The Defendant cannot claim he is at a disadvantage as far as awareness of sentencing, as the pre-sentence investigation has not yet begun. Should the Defendant desire to withdraw his plea at this time due to his alleged belief that by pleading guilty at the arraignment he would avoid designation as a persistent felony offender, the State does not object.

DATED this 19 day of April, 2012.

/s/ MARK THIESZEN
DEPUTY COUNTY ATTORNEY

LAW OFFICES OF FRANCIS P. McGEE
125 West Granite Street
Suite 102 Silver Bow Center
Butte, MT 59701
Telephone: (406) 723-8770

Attorney for Defendant BETTERMAN

MONTANA SECOND JUDICIAL DISTRICT,
SILVER BOW COUNTY

No. DC-12-45

THE STATE OF MONTANA, PLAINTIFF,

v.

BRANDON THOMAS BETTERMAN, DEFENDANT.

April 27, 2012.

DEFENDANT'S MOTION IN OPPOSITION TO PFO NOTICE AND MOTION TO STRIKE THE SAME

Comes now the defendant, BRANDON THOMAS BETTERMAN, and opposes the state's

persistent felony offender (PFO) notice and moves to strike the same as untimely and as a violation of the defendant's due process rights.

Said motion is based upon this pleading as well as the Memorandum of Points and authorities attached hereto as well as the court file herein.

Dated: April 27, 2012.

/s/ FRANCIS P. McGEE
Attorney for Defendant BETTERMAN

MEMORANDUM OF POINTS AND AUTHORITIES

BACKGROUND

Brandon Betterman was charged with a felony partner-family assault (PFMA) charge and pleaded guilty to it pursuant to a plea agreement which was not binding on the court. A pre-sentence investigation was ordered, and succinctly, when the court set the date for sentencing, the defendant didn't show up until two months or so later. He came to Butte, and turned himself in at the Butte Police station.

The defendant was sentenced on the PFMA was the county attorney filed the bail jumping charge. At one point, the county attorney indicated to counsel he might consider dropping the bail jumping charge depending on how the court sentenced Mr. Betterman. Thereafter, the county attorney did indicate to counsel for Mr. Betterman that he intended to file a PFO Notice.

On April 18, 2012, the defendant, Brandon Betterman, appeared in front of the Court, was

advised of his rights at arraignment, and entered a plea of guilty with a written waiver of rights. The court accepted the plea and ordered a pre-sentence investigation. Neither the written waiver of rights nor the advisement by the court included anything regarding a PFO notice, which, in fact, had not been filed at the time of the plea. After the court accepted the plea, the county attorney approached the bench with defense counsel and indicated he intended to file the PFO. The PFO notice was not filed until after the entry of plea, and in spite of the oral indications to counsel, the defendant was never on notice as required by statute.

At the bench, the defendant's counsel contended that the county attorney cannot file a PFO Notice once the defendant has pleaded guilty and has not been properly noticed - **in advance** - of the PFO or the attendant consequences.

LEGAL ANALYSIS

Section **46-13-108 MCA** provides for the required notice provisions for designating a defendant as a persistent felony offender (PFO). It states:

"(1) Except for good cause shown, if the prosecution seeks treatment of the accused as a persistent felony offender, notice of that fact must be given at or before the omnibus hearing pursuant to 46-13-110.

(2) The notice must specify the alleged prior convictions and may not be made known to the jury before the verdict is returned except as allowed by the Montana Rules of Evidence.

(3) If the defendant objects to the allegations contained in the notice, the judge shall conduct a hearing to determine if the allegations in the notice

are true.

(4) The hearing must be held before the judge alone. If the judge finds any allegations of the prior convictions are true, the accused must be sentenced as provided by law.

(5) The notice must be filed and sealed until the time of trial or until a plea of guilty or nolo contendere is given by the defendant."

A defendant must object to a persistent felony offender notice, otherwise, no hearing or findings regarding alleged prior convictions are required. **St. v. Minez, 2003 MT 344, 318 M 478,82 P3d 1 (2003); St. v. Gallagher, 2005 MT 336,330 M 65, 125 P3d 1141 (2005)**.

Even if the Notice of Intent to file a PFO is filed late with the Court, if counsel is given Notice, the PFO designation is deemed to be adequate. **State v. McQuiston, 277 Mont. 397,409,922 P.2d 519,527 (1996)**.

When the prosecution gives the defense notice of additional evidence of prior acts that the state intended to introduce on the first day of trial, that constitutes improper notice and the defendant cannot be compelled to choose between exercising speedy trial rights, as well as his right to proper notice, or continuing the case. **State v. Croteau, 248M 403, 812 P2d 1251, 48 St. Rep. 484 (1991)**. Prior to the 1991 Amendment, the case law held that the state could give defendant who pleaded not guilty notice of intent to seek increased punishment at any point prior to the beginning of the trial and did not have to give the notice before or at the pretrial omnibus hearing. **State v. Scheffelman, 225 M 408, 733 P2d 348, 44 St. Rep. 357 (1987); State v. Seitzinger, 180 M 136, 589 P2d 655 (1979)**. The Montana

Supreme Court has also held that notice can be given any time before the case is "called for trial", meaning the beginning of the trial. **State v. Johnson, 179 M 61, 585 P2d 1328 (1978)**.

The second notice applies when a defendant is convicted. The first notice is jurisdictional and was clearly given in this case. The second notice is procedural. The record does not show any prejudice due to lack of the second notice, because defendant appeared at the hearing with counsel and did not contest the lack of notice. **State v. Madera, 206 M 140, 670 P2d 552, 40 St. Rep. 1558 (1983)**; **State v. Hawkins, 239 M 404, 781 P2d 259, 46 St. Rep. 1786 (1989)**.

The Montana Supreme Court has held under the old statute that the first notice must be given to the defendant in **writing before the entry of a plea of guilty by the accused or before the case is called for trial upon a plea of not guilty**, and that notice must specify the prior convictions alleged to have been incurred by the accused. The notice and the charge of the prior convictions are not to be made public in any manner or in any manner made known to the jury before the verdict is returned upon the felony charge. The second notice applies when a defendant is convicted. The first notice is jurisdictional. The second notice is procedural. **Madera at 206 Mont. 154-155, 670 P2d at 559-560**.

The Montana Supreme Court presumes that the Legislature does not pass meaningless legislation, and that the Legislature acts with deliberation and full knowledge of all existing laws on a subject. **Oster v. Valley Co., 2006 MT 180, P 17, 333 Mont. 76, 140 P.3d 1079; Ross v. City of Great Falls, 1998 MT 276, P 17, 291 Mont. 377, 967 P.2d 1103.**

Additionally, where general and specific statutes exist and the two cannot be harmonized to give effect to both, the specific statute controls. **State v. Oie, 2007 MT 328, P 17, 340 Mont. 205,174 P.3d 937**.

DISCUSSION AND CONCLUSION

Although the case law allows for some latitude in filing it is clear from the **Hawkins** case, and particularly from the **Madera** case **that the notice is jurisdictional**. Interestingly, the state fails to cite any authority for any of its contentions other than the definition of a PFO. The Montana Supreme Court made it abundantly clear that under the old statute the first notice to the defendant **was jurisdictional and must be given prior to the start of trial or before a plea of guilty**. There is nothing in the current statute that contravenes this holding, and counsel has not been able to find a case overturning **Madera**. This Court would have to overrule or ignore the Montana Supreme Court's holding in **Madera** to decide that the state is entitled to proceed to have this court sentence the defendant as a PFO.

Dated: April 27, 2012.

Respectfully submitted,

/s/ FRANCIS P. McGEE
Attorney for Defendant
BETTERMAN

MONTANA SECOND JUDICIAL DISTRICT,
SILVER BOW COUNTY

No. DC-12-45

THE STATE OF MONTANA, PLAINTIFF,

v.

BRANDON THOMAS BETTERMAN, DEFENDANT.

May 2, 2012.

ORDER FOR PRE-SENTENCE INVESTIGATION

The Defendant appeared before the Court on April 19, 2012, together with defense counsel, Frank McGee for arraignment. The Court advised him of his rights the Defendant of his rights and determined that he was acting knowingly and voluntarily. The Defendant then entered a guilty plea to Bail Jumping as stated in the Information. The Court accepted such plea. The Court determined a pre-sentence investigation was necessary. Accordingly,

IT IS ORDERED that the Montana Adult Probation Office shall conduct a pre-sentence

investigation in this matter including a determination of the amount of restitution owing the victims in this matter. The investigation shall include a representation of the Defendant's criminal record if any. Upon receipt of the pre-sentence investigation, the Court shall set this matter for sentencing.

DATED this 2nd day of May, 2012.

/s/ Kurt Krueger
District Court Judge

MARK THIESZEN
DEPUTY COUNTY ATTORNEY
Butte-Silver Bow Courthouse
155 West Granite Street
Butte, Montana 59701
(406) 497-6230
Attorney for Plaintiff

MONTANA SECOND JUDICIAL DISTRICT,
SILVER BOW COUNTY

No. DC-12-45

THE STATE OF MONTANA, PLAINTIFF,

v.

BRANDON THOMAS BETTERMAN, DEFENDANT.

May 10, 2012.

STATE'S MOTION FOR EXTENSION OF TIME TO RESPOND TO DEFENDANT'S MOTION IN OPPOSITION TO PFO NOTICE

COMES NOW the State of Montana and

requests additional time in which to respond to Defendants motion filed with this Court on April 27, 2012. Given the current work load the State needs additional time in which to respond. The Defendant is incarcerated on other charges and no sentencing date has been set yet. The State contacted the attorney for the Defendant and he does not object to this motion.

DATED this 10 day of May 2012.

EILEEN JOYCE
COUNTY ATTORNEY

/s/ MARK THIESZEN
DEPUTY COUNTY ATTORNEY

MONTANA SECOND JUDICIAL DISTRICT,
SILVER BOW COUNTY

No. DC-12-45

THE STATE OF MONTANA, PLAINTIFF,

v.

BRANDON THOMAS BETTERMAN, DEFENDANT.

May 10, 2012.

ORDER GRANTING STATE'S MOTION FOR EXTENSION OF TIME TO RESPOND TO DEFENDANT'S MOTION IN OPPOSITION TO PFO NOTICE

This matter came before the Court on the State's Motion for Extension of Time to Respond to Defendant's Motion In Opposition to PFO Notice.

The Court determines it is appropriate to allow additional time. Accordingly, it is hereby:

ORDERED that the State has until June 15, 2012 in which to file a responsive brief.

DATED this 10th day of May, 2012.

/s/ Kurt Krueger
District Court Judge

MARK THIESZEN
DEPUTY COUNTY ATTORNEY
Butte-Silver Bow Courthouse
155 West Granite Street
Butte, Montana 59701
(406) 497-6230
Attorney for Plaintiff

MONTANA SECOND JUDICIAL DISTRICT,
SILVER BOW COUNTY

No. DC-12-45

THE STATE OF MONTANA, PLAINTIFF,

v.

BRANDON THOMAS BETTERMAN, DEFENDANT.

June 13, 2012.

STATE'S BRIEF IN RESPONSE TO DEFENDANT'S MOTION IN OPPOSITION TO PFO NOTICE

COMES NOW the State of Montana and submits this brief in response to Defendant's Motion.

Defendant argues that he can be aware of the State's intent to seek designation as a persistent felony offender (PFO) but avoid such designation by pleading guilty before the deadline for the State to file notice.

FACTS

On March 5, 2012, the Stated filed a complaint charging the Defendant with the Bail Jumping offense in the present case. On March 15, the Defendant appeared before this Court for sentencing on another matter, the charge of Partner or Family Member Assault, DC-11-36. The Court sentenced the Defendant to the Department of Corrections for five years with two years suspended in that case.

On April 19, 2012, the Defendant appeared before the Court for arraignment on the Bail Jumping charge. The State had previously orally informed counsel for the Defendant that the State intended to seek designation as a persistent felony offender. The Defendant entered a plea of guilty at the arraignment; counsel for the defendant informed the Court that the reason the Defendant entered a plea of guilty at the arraignment was to avoid designation as a PFO. The State filed a PFO notice on the date of the arraignment.

ARGUMENT

The State had given notice that it intended to seek designation as a PFO. The Defendant acknowledged that he had been notified of the State's intention to treat him as a PFO. Defendant's Motion In Opposition to PFO Notice and Motion To Strike the Same, pg. 2 ("the county attorney did indicate to counsel for Mr. Betterman that he intended to file a PFO Notice"). At the arraignment, without the benefit of a pre-trial agreement, the Defendant

entered a plea of guilty to the charge. The State was not expecting the Defendant to plead guilty and advised the Court, and re-advised counsel for the Defendant, that the State intended to seek designation as a PFO. The Defendant responded that he pled guilty to avoid such designation and that once he pleads guilty the State is out of luck.

The Montana Supreme Court has specifically and repeatedly stated that the purpose of the PFO notice requirement is to provide an opportunity to object to the basis of the PFO designation. Here, the Defendant was aware of the State's intent to seek PFO and was aware of the prior conviction that qualified him as a PFO. The purpose of the notice statute was met in this case. The Defendant attempted to avoid the sentencing enhancement that he had knowledge of by rushing to plead guilty; such conduct cannot allow the Defendant to escape the consequences of his actions.

The Defendant does not dispute that he qualifies as a PFO, rather, he is only challenging whether the State provided sufficient notice of its intent to seek designation as a PFO.

Section 46-13-108(1), MCA (2011), states: "Except for good cause shown, if the prosecution seeks treatment of the accused as a persistent felony offender, notice of that fact must be given at or before the omnibus hearing pursuant to 46-13-110." In 1991 significant changes were made to § 46-13-108, MCA. The words "in writing" were removed from the statute, and the timing requirements were changed. *See* Montana Code Annotated, Annotations, § 46-13-108 (2010); § 46-18-503, MCA (1987); § 46-13-108, MCA (1991), *State v. McQuiston*, 277 Mont. 397, 922 P.2d 519 (1996). The statutory changes are important

to note; the Defendant's Motion almost entirely cites cases addressing the old statute.

In the case at hand, the State's filed notice clearly meets the statutory requirement of being filed before the omnibus hearing. The question is whether case law makes the notice inadequate where the Defendant acknowledges receiving notice, but notice is not filed with the Court until after the Defendant entered a guilty plea at his arraignment with the specific purpose of avoiding designation as a PFO. The Montana Supreme Court has apparently not addressed this specific question, yet there are several cases that address similar situations.

A. Opportunity to Challenge

Although the Defendant repeatedly references case law addressing the old statute, the Montana Supreme Court has issued important opinions addressing the *current* statute. First, the Court has stated the purpose of the statute. The Court has repeatedly explained:

> The purpose for providing such notice is to give the defendant an opportunity to file an **objection to the criminal record** relied upon in the notice and to hold a hearing should there be any such objection.

State v. Shults, 2006 MT 100, , 22, 332 Mont. 130; 136 P.3d 507; *State v. Ramsey*, 2007 MT 31,, 20, 336 Mont. 44, 152 P.3d 710; *McQuiston*, 277 Mont. 397, at 408, 911 P.2d 519, at 526. The purpose is that prior to sentencing, the Defendant has an opportunity to ensure the validity of the offenses the PFO is based on. *McQuiston*, 277 Mont. 397, at 409, 911 P.2d 519, at 527.

The second important precedent from the

Court on the current statute reveals what the Court is looking for in regard to whether the timing of a PFO notice is problematic. The Court has stated time and time again:

> If a defendant had ample opportunity to object to PFO treatment, including the underlying charge on which the statute is based, and that defendant was not prejudiced by the timing of the filing, we will not overturn a district court's decision to impose a sentence with a PFO designation.

State v. Dodson, 2009 MT 419, ,53, 354 Mont. 28, 221 P.3d 687; *Shults*, ¶ 22; *Ramsey*, ¶ 20; *McQuiston*, 277 Mont. 397, at 409, 911 P.2d 519, at 527.

In *McQuiston*, the State had notified counsel for the Defendant of its intent to seek PFO designation to counsel for the defendant, but did not file a notice with the Court until the defendant was found guilty at trial. The Court held that "the notice was filed with the District Court five months prior to sentencing. We conclude that McQuiston was not prejudiced by the State's failure to file notice [prior to trial]." *McQuiston*, 277 Mont. 397, at 409, 911 P.2d 519, at 527. The Court in *McQuiston* also discussed the old-statute case Madera, and explained that in that case the Court found no prejudice "since [the defendant] had sufficient notice of the charge which would be used against him." *Id.*

In the case at hand, the Court must find the same, the Defendant has ample opportunity to object and has not been prejudiced. A sentencing date has not even been set yet; therefore the Defendant has plenty of opportunity to challenge that his Partner Family Member Assault conviction does not meet the requirements of the PFO statute. Additionally, the

Defendant has asserted no prejudice due to the timing of the filing, he is well aware of the Partner Family Member Assault charge that will be used against him.

B. Form of Notice

Counsel for the Defendant was notified that the State intended to seek designation as a PFO prior to the arraignment. Defendant's Motion In Opposition to PFO Notice and Motion To Strike the Same, pg. 2 ("the county attorney did indicate to counsel for Mr. Betterman that he intended to file a PFO Notice"). Unlike the old statute, which the cases the Defendant relies on interpret, the statutory amendments in 1991 removed the words "in writing" from the statute. Obviously, the notice must be written at some point if it is to be filed with the Court, but the Montana Supreme Court has already held valid notice provided to the defendant and not filed with a district court until after a guilty finding. *McQuiston*, 277 Mont. 397, 911 P.2d 519. Additionally, not only was the Defendant on notice, this is a case where there is no ambiguity to what prior conviction a PFO designation would be based on. The Defendant was arraigned five weeks to the day after the sentencing on his Partner Family Member Assault conviction.

C. Good Cause

It is important to keep in mind the positioning of this case. The Defendant cannot claim he was unaware of the potential of being sentenced as a PFO. Rather, the Defendant entered a guilty plea at his arraignment in an attempt to avoid being sentenced as a PFO. The Defendant has made no attempt to deny that he is in fact a persistent felony offender.

The purpose of the statue is to ensure that

PFO designation is not sprung on a Defendant at sentencing without an opportunity to check the validity of a prior conviction. In this case, the Defendant is deliberately attempting to use the statute to avoid a PFO designation that he was well aware of. Such purpose does not comply with the statute.

As mentioned above, the statute merely requires that the State provide notice at or before the omnibus. Here, the State provided notice on the same day as the arraignment, but after the Defendant entered a plea of guilty. However, the case law discussed above, the State's notice to counsel for the Defendant prior to the arraignment, and the Defendant's awareness of the State's intent to seek PFO designation are good cause to accept the notice in this case. The Defendant still has ample opportunity to object to the underlying charge on which the statute is based.

CONCLUSION

The State provided notice to counsel for the Defendant that it would seek designation of the Defendant as a PFO, filed notice with the Court on the date of the arraignment, and the Defendant was aware of the underlying charge and will not be surprised at sentencing by such designation. These facts in light of the applicable case law and current statute show that the Court should **DENY** the Defendant's motion. Finally, as stated in the State's Notice filed on April19, 2012, should the Defendant desire to withdraw his plea at this time due to his apparent belief that by pleading guilty at the arraignment he would avoid designation as a PFO, the State does not object.

DATED this 13 day of June 2012.

EILEEN JOYCE
COUNTY ATTORNEY

/s/ MARK THIESZEN
DEPUTY COUNTY ATTORNEY

MONTANA SECOND JUDICIAL DISTRICT,
SILVER BOW COUNTY

No. DC-12-45

THE STATE OF MONTANA, PLAINTIFF,

v.

BRANDON THOMAS BETTERMAN, DEFENDANT.

June 13, 2012.

ORDER SETTING HEARING

This matter comes before the Court on outstanding motions. Based on the motions before the Court,

It is hereby

ORDERED that an all motions hearing be set for Thursday, the 28th day of June, 2012 at 11:00 a.m.

DATED this 13th day of June, 2012

/s/ Kurt Krueger
District Court Judge

MONTANA SECOND JUDICIAL DISTRICT,
SILVER BOW COUNTY

No. DC-12-45

THE STATE OF MONTANA, PLAINTIFF,

v.

BRANDON THOMAS BETTERMAN, DEFENDANT.

June 28, 2012.

MINUTE ENTRY

KURT KRUEGER, Presiding Judge

ANN WAYRYNEN, Court Reporter

This day this cause came on for hearing on the Defendant's motion to strike the State's notice of intent to seek designation of the Defendant as a persistent felony offender. Deputy County Attorney Mark Thieszen, Esq. was present for the State of Montana; The Defendant was present with Counsel Francis P. McGee, Esq. There upon, the Court heard oral argument from counsel and, at the conclusion

thereof, took this matter under advisement. The Court remanded the Defendant to the custody of the sheriff pending sentencing.

MONTANA SECOND JUDICIAL DISTRICT,
SILVER BOW COUNTY

No. DC-12-45

THE STATE OF MONTANA, PLAINTIFF,

v.

BRANDON THOMAS BETTERMAN, DEFENDANT.

November 27, 2012.

ORDER DENYING DEFENDANT'S MOTION IN OPPOSITION TO PFO NOTICE AND MOTION TO STRIKE

This matter comes before the Court on DEFENDANT'S MOTION IN OPPOSITION TO PFO NOTICE AND MOTION TO STRIKE THE SAME filed on April27, 2012. The State of Montana filed STATE'S BRIEF IN RESPONSE TO DEFENDANT'S MOTION IN OPPOSITION TO PFO NOTICE on June 13, 2012. This matter relates to the State's notice of intent to seek designation of Defendant as a persistent felony offender ("PFO") filed after

Defendant plead guilty at arraignment to a bail jumping charge. On June 28,2012, the Court held a hearing in relation to this matter. Defendant was present with his attorney, Francis McGee. Deputy County Attorney Mark Thieszen was present for the State of Montana. The Court now issues the following order after reviewing this matter and hearing oral arguments from the attorneys.

On March 5, 2012, the State filed a complaint charging Defendant with the criminal offense of BAIL JUMPING, a felony in violation of Section 45-7-308, MCA. On March 15,2012, in a separate matter, Cause Number DC-11-36, Defendant was sentenced on a charge of PARTNER OR FAMILY MEMBER ASSAULT- 3rd OR SUBSEQUENT OFFENSE, a felony in violation of Section 45-5-206(1)(a), MCA. Pursuant to the bail jumping charge, the State now seeks to designate Defendant as a PFO under Section 46-18-501, et seq., MCA. The PFO statute states: "A 'persistent felony offender' is an offender who has previously been convicted of a felony and who is presently being sentenced for a second felony on a different occasion than the first." MCA § 46-18-501.

On April 19, 2012, Defendant appeared for arraignment on the bail jumping charge. Prior to the arraignment, the State orally notified counsel for Defendant that the State would seek to designate Defendant as a PFO; however, the State had not filed notice of intent to seek PFO designation at the time of the arraignment. At the arraignment, Defendant was advised of his rights and entered a plea of guilty to the bail jumping charge with a written waiver of rights. The Court accepted the guilty plea and ordered a pre-sentence investigation. Neither the written waiver of rights nor the advisement by the Court included anything regarding a PFO notice.

Following Defendant's guilty plea, counsel for both parties approached the bench and the State informed the Court of its intention to seek PFO designation. The State had not yet filed its PFO notice because the State was not expecting Defendant to plead guilty at the arraignment without the benefit of a pre-trial agreement. Defendant purportedly entered his guilty plea at the arraignment to avoid PFO designation since the State had not yet filed its notice of intent to seek PFO designation. At the bench, counsel for Defendant contended that the State could no longer file PFO notice after Defendant entered his guilty plea. Following the arraignment, the State prepared and filed a PFO notice on April19, 2012, the same day as the arraignment.

Defendant opposes the State's PFO notice claiming the notice was untimely as it was filed after Defendant entered his guilty plea. Defendant argues that being sentenced pursuant to a PFO designation would violate his due process rights. Defendant admits the State orally notified counsel for Defendant that the State intended to seek PFO designation prior to Defendant entering his guilty plea; however, Defendant argues that Montana Supreme Court held in *State v. Madera*, 206 Mont. 140, 154, 670 P.2d 552, 559 (1983) that a previous version of the PFO notice statute required notice be given in writing before the entry of a plea of guilty. Defendant claims nothing in the current PFO notice statute contravenes the *Madera* holding, and *Madera* has not been overruled.

The State responds that significant changes were made to the PFO notice statute in 1991 where the timing requirements were changed and the writing requirement was removed. The State argues Defendant's motion should be denied because the State orally notified counsel for Defendant that the

State would seek to designate Defendant as a PFO before Defendant entered his guilty plea. The State contends Defendant will not be prejudiced or surprised at sentencing by the PFO designation because notice was filed on the same day as the arraignment after Defendant entered his plea. Furthermore, the State claims it would not object to Defendant withdrawing his guilty plea based on his belief that he could avoid PFO designation by entering a guilty plea at arraignment.

The issue in this case surrounds whether Defendant was provided adequate notice of the State's intention to designate him as a PFO. The PFO notice statute provides:

(1) Except for good cause shown, if the prosecution seeks treatment of the accused as a persistent felony offender, notice of that fact must be given at or before the omnibus hearing pursuant to 46-13-110.

(2) The notice must specify the alleged prior convictions and may not be made known to the jury before the verdict is returned except as allowed by the Montana Rules of Evidence.

(3) If the defendant objects to the allegations contained in the notice, the judge shall conduct a hearing to determine if the allegations in the notice are true.

(4) The hearing must be held before the judge alone. If the judge finds any allegations of the prior convictions are true, the accused must be sentenced as provided by law.

(5) The notice must be filed and sealed until the time of trial or until a plea of guilty or nolo contendere is given by the defendant.

MCA § 46-13-108, et seq. (2011).

The purpose for providing notice of intent to seek PFO designation "is to give the defendant an opportunity to file an objection to the criminal record relied upon in the notice and to hold a hearing should there be any objections." *State v. McQuinston*, 277 Mont. 397,408, 922 P.2d 519, 526 (1996), *overruled on other grounds by State v. Herman*, 2008 MT 187,343 Mont. 494,188 P.3d 978. Pursuant to both the Fourteenth Amendment to the United States Constitution and Article II, Section 17 of the Montana Constitution, no person shall be deprived of life, liberty or property without due process of law. "The fundamental requisite of due process of law is the opportunity to be heard." *Goldberg v. Kelly*, 397 U.S. 254, 267, 90 S.Ct. 1011, 1020, 25 L.Ed.2d 287 (1970) (quoting *Grannis v. Ordean*, 234 U.S. 285,294,24 S.Ct. 779,783, 58 L.Ed. 1363 (1914)). Further, due process requires timely and adequate notice. *Goldberg*, 397 U.S. at 267, 90 S.Ct. at 1020.

In *Madera*, the Montana Supreme Court interpreted a previous version of the PFO notice statute. The old statute required two PFO notices. The first notice required the prosecution inform the defendant or his attorney in writing of its intent to seek PFO designation prior to the entry of a guilty plea or before trial. The second notice applied following a conviction where the prosecution was required to file PFO notice with the district court prior to sentencing. The defendant in *Madera* received written PFO notice from the prosecution before trial, but the defendant claimed the second notice to the district court was deficient. The *Madera* court concluded the first notice was jurisdictional while the second notice was simply procedural. The court held the prosecution's failure to file the second

notice with the district court was not prejudicial since the defendant had sufficient notice of The charge against him. *Madera*, 206 Mont. at 154-55, 670 P.2d at 559-60.

The Montana Supreme Court followed the logic from Madera when reaching a later decision in *McQuiston*. The *McQuiston* court interpreted the current PFO notice statute and concluded the prosecution compiied with Section 46-13-1 08(1), MCA, but it did not comply with Section 46-13-1 08(5), MCA. The prosecution notified the defendant of its intention to seek PFO designation over a month prior to the omnibus hearing and five months before trial, but it did not file notice with the district court until after the trial; however, the PFO notice was filed with the district court five months prior to sentencing. The *McQuiston* court concluded it would not overturn a district court's decision to impose a PFO designation when the defendant received notice of the prosecution's intention to seek a PFO designation and the defendant was not prejudiced by the prosecution's failure to file the notice. The court held the defendant was not prejudiced by the prosecution's failure to file PFO notice prior to trial. *McQuiston*, 277 Mont. At 408, 922 P.2d at 526-27.

Moreover, a guilty plea that is voluntary and intelligent constitutes a waiver of nonjurisdictional defects and defenses. *State v. Wheeler*, 285 Mont.31, 35, 873 P.2d 1385, 1387 (1997). The general rule is that a guilty plea waives claims of constitutional rights violations prior to the entry of the plea because the person pleading guilty is convicted and sentenced on his plea, not on the evidence. *State v. Turcotte*, 164 Mont. 426, 428, 524 P.2d 787, 788 (1974). In *Tollett v. Henderson*, the United States Supreme Court stated: "When a criminal defendant has solemnly admitted

in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. He may only attack the voluntary and intelligent character of the guilty plea. *Tollett v. Henderson*, 411 U.S. 258,267, 93 S.Ct. 1602, 1608, 36 L.Ed.2d 235 (1973).

Here, the Court finds the State did not comply with Section 46-13-108(5), MCA, requiring the State file PFO notice prior to a plea of guilty by Defendant. Similar to *Madera* and *McQuiston*, however, the Court finds Defendant is not prejudiced by the State's late filing of the PFO notice because Defendant had sufficient notice of the charge against him. The State orally notified counsel for Defendant of its intent to seek PFO designation prior to Defendant entering his guilty plea. Written notice is no longer specifically required by the PFO notice statute. Furthermore, PFO designation is a matter considered at sentencing and PFO notice was filed well before sentencing in this matter. The PFO notice was filed the same day Defendant entered his guilty plea and sentencing has not yet occurred. Although Defendant does not currently contest the validity of the PFO designation, Defendant has the ability to object to the criminal record relied upon in the PFO notice.

The Court concludes jurisdiction exists to consider Defendant as a PFO when the State filed its notice of intent to designate Defendant as a PFO on April19, 2012. Under the current statutory scheme, timeliness of the filing of the PFO notice was not jurisdictional. The late PFO notice was a procedural defect. When Defendant plead guilty and admitted he committed the criminal offense of bail jumping, he waived his right to challenge any constitutional or

procedural defects that occurred prior to the entry of the guilty plea; including the timeliness of the State's filing of the PFO notice. Having entered a plea of guilty, Defendant may only attack the voluntary and intelligent character of the guilty plea. Defendant may argue that he lacked knowledge of the consequences of being designated as a PFO and the State claims it would not object to Defendant withdrawing his guilty plea based on his belief that he could avoid PFO designation by entering a guilty plea at arraignment.

Based on the foregoing, it is hereby

ORDERED that Defendant's motion in opposition to PFO notice and Motion to strike the same by *DENIED*.

DATED this 27 day of November, 2012.

/s/ Kurt Krueger
District Court Judge

MONTANA SECOND JUDICIAL DISTRICT,
SILVER BOW COUNTY

No. DC-12-45

THE STATE OF MONTANA, PLAINTIFF,

v.

BRANDON THOMAS BETTERMAN, DEFENDANT.

December 27, 2012.

ORDER SETTING SENTENCING HEARING

The Court having ordered the a pre-sentence investigation and the pre-sentence report having been completed,

IT IS ORDERED that the Defendant, BRANDON THOMAS BETTERMAN, shall appear before the Second Judicial District Court on Thursday, the 17th day of January, 2013 at 10:00 a.m. for purposes of sentencing in this matter.

DONE AND DATED this 27 day of December, 2012.

/s/ Kurt Krueger
District Court Judge

LAW OFFICES OF FRANCIS P. McGEE
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Telephone: (406) 723-8770

Attorney for Defendant BETTERMAN

MONTANA SECOND JUDICIAL DISTRICT,
SILVER BOW COUNTY

No. DC-12-45

THE STATE OF MONTANA, PLAINTIFF,

v.

BRANDON THOMAS BETTERMAN, DEFENDANT.

January 16, 2013.

MOTION TO DISMISS ON GROUNDS OF DENIAL OF SPEEDY TRIAL

Comes now the defendant, BRANDON BETTERMAN, and hereby gives notice of his intent

to move to dismiss the action filed herein on the grounds that he has been deprived of his right to a speedy trial under the Montana and the United States Constitutions.

Said motion is based on this notice of motion and on the court file, the accompanying memorandum of points and authorities and upon such other matters as the court may, by law, consider, including testimony.

Dated: 1-16-2013.

/s/ FRANCIS P. McGEE
Attorney for Defendant

MEMORANDUM OF POINTS AND AUTHORITIES

I. FACTUAL BACKGROUND

On or about March 5, 2012, the State filed a complaint against the defendant in Justice Court alleging a violation of 45-7-308 MCA 2011, Bail Jumping, a felony, committed on or about December 9, 2011 (note: counsel believes the defendant surrendered himself voluntarily at the Butte-Silver Bow Sheriff's station on or about February 9, 2012). On April 2, 2012, by leave of court, the State filed an Information in the District Court alleging the same. On April 19, 2012, the defendant appeared in front of Judge Kurt Krueger with counsel and entered a plea of guilty to the charged offense after having been fully advised of his rights and presenting a written waiver of the same to the Court. The Court accepted the plea. At the time of the entry of plea, the Persistent Felony Offender (PFO) Notice had not been filed. Later the same day, after the entry of the defendant's guilty plea, the PFO notice was filed. At the time of plea, the Court indicated from the bench

that it was ordering a pre-sentence investigation (PSI), and issued a written order for the same on May 2, 2012, filed with the Clerk of District Court on May 3, 2012.

On April 27, 2012, defendant timely filed his opposition to the PFO notice and a motion to strike the PFO notice and designation. On May 10, 2012, the State requested additional time to respond to the motion to which the defendant did not object, and the Court ordered additional time for the state until June 15, 2012. On June 13,2012, the State filed its response brief and the Court ordered a hearing on the motion for June 28, 2012.

The PSI was not completed until October 10, 2012, per the date on the document and filed. As of November 7, 2012, the defendant had not been sentenced nor had the court ruled on the PFO opposition and motion to strike. On November 27, 2012, the Court entered its order denying the defendant's motion in opposition to PFO notice and motion to strike. The date of the Pre-sentence investigation is October 10, 2012. Counsel is unaware of what the actual date of filing of the same was, and for whatever reason, the date of receipt is not noted on the document in counsel's file.

During the entirety of the time from the filing of the complaint in Justice Court to the present, the defendant remained in the Butte-Silver Bow jail. During this time he was a Department of Corrections (DOC) commitment having been sentenced in underlying case on March 15, 2012, to five years DOC with two years suspended, and credit for fifty-three (53) days time served. As of January 15, 2012, the defendant had been in custody for over 11 months. He was conditionally eligible for parole or conditional

release on that sentence but apparently, could not be heard or contacted by the parole board. He has been in custody for nearly nine months awaiting to be sentenced on this case. In DC-11-36, the defendant was ordered to perform numerous tasks on the suspended portion of his sentence, to wit, obtaining a chemical dependency evaluation, a mental health evaluation, and other conditions. Obviously, he hasn't been able to do any of that other than completing Phase I of the Anger Management Group while in the Butte-Silver Bow Detention Center.

In addition, the defendant has a violation of probation hold, as counsel is informed, out of Stillwater County relating to a DUI case and the completion of alcohol classes which he cannot do while incarcerated, nor can he appear to take care of the matter otherwise.

II. LEGAL ANALYSIS

In **State v. Moonev**, 332 Mont. 429, 137 P.3d 532, P 15 (2006) the Montana Supreme Court held that the right to speedy trial applies through sentencing. The defendant must assert his right prior to sentencing. **Id.** The balance of the test is the length of the delay, the reason for the delay, and the prejudice to the defense. The **Moonev** case appears in part to be based on **Pollard v. United States**, 352 U.S. 354, 361, 77 S.Ct. 481, 486, 1 L.Ed. 2d 393, 399 (1957), which required under the old Federal Rule of Criminal Procedure, 32 (b) that sentence be imposed without "unreasonable delay." See, infra.

The United State Supreme Court has identified three defense interests, as pointed out in **Mooney**, P 16, citing **Barker v. Wingo**, 407 U.S. 514, 532, 92 S.Ct. 2182, 2193, 33 L.Ed. 2d 101, 118 (1972). Those are: (1) to minimize oppressive pretrial

incarceration; (2) minimize the concern and anxiety of the accused; and (3) limit the possibility of the impairment of the defense. The Federal Rules Of Criminal Procedure, Rule 32 (b) (1), require that sentence must be imposed without unnecessary delay.

A lengthy decision, **State v. Ariegwe**, 338 Mont. 442: 167 P.3d 815 pp. 56-58 (2007) reevaluated the Montana Supreme Court's speedy trial analysis that had been used previously. The court adopted a 200-day trigger date for speedy trial analysis. That benchmark date is minimal and escalates over time.

"The accused should come forward with evidence tending to establish prejudice, the State should come forward with evidence tending to establish the contrary, and the court must weigh each party's evidence (or lack thereof) pursuant to the principles discussed above. Thus, the State's failure to make a persuasive showing of no prejudice weighs more heavily against it in the overall balancing when the delay is long, but such failure is of little weight where the delay is relatively brief. Likewise, a persuasive showing of prejudice by the defendant is more important where the delay is short and less important where the delay is long." **Id.** at p. 56.

Rather than reiterate the various factors discussed in **Ariegwe**, the Court attention is respectfully invited to the entire opinion. Needless to say, a number of other items are such as institutional delay and its attribution are discussed in the opinion, as well as a balancing test. It is clear that over 290 days have passed since the initiation of prosecution in the District Court, and 318 days since the prosecution began by the filing of the Justice Court complaint, and 273 days since the defendant entered his guilty

plea in District Court. Defendant suggests that he has undergone concern and anxiety over his future, cannot complete any of the court's requirements in its Department of Corrections commitment, that his rehabilitation has been hampered, that he has been unable to attend to his misdemeanor matter in Stillwater County, and that the delay between his plea and sentencing is beyond the pale, so to speak.

Dated: January 16, 2013.

Respectfully submitted,

/s/ FRANCIS P. McGEE
Attorney for Defendant

MONTANA SECOND JUDICIAL DISTRICT,
SILVER BOW COUNTY

No. DC-12-45

THE STATE OF MONTANA, PLAINTIFF,

v.

BRANDON THOMAS BETTERMAN, DEFENDANT.

January 17, 2013.

TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE KURT KRUEGER, PRESIDING

APPEARANCES

FOR THE PLAINTIFF:

SAMM COX
CHIEF DEPUTY COUNTY ATTORNEY
155 WEST GRANITE STREET
BUTTE, MONTANA 59701

FOR THE DEFENDANT:

FRANCIS P. MCGEE, ESQ.
125 WEST GRANITE STREET; SUITE 103
BUTTE, MONTANA 59701

[3] (Whereupon, the following proceedings were had.)

THE CLERK: Cause No. DC-12-45, the State of Montana versus Brandon Thomas Betterman.

THE COURT: Good morning.

MR. MCGEE: Good morning, your Honor.

THE COURT: This is the time set for sentencing. I see that this morning, there's a Motion to Dismiss on the grounds of denial of speedy trial. Mr. McGee.

MR. MCGEE: Your Honor, that was filed this morning when apparently I had run across a case called State versus Mooney, M-O-O-N-E-Y, while I was researching State versus Ariegwe, A-R-I-E-G-W-E, and it rang a bell. And I think I'm compelled to do that in part based on Ariegwe and Mooney as well, and I realize the State hasn't even had a chance to respond to it, but basically, if I am going to raise the issue, I'm required to do it prior to sentencing.

MR. COX: I would like my 10 days service, your Honor.

THE COURT: So obviously, we're going to continue the sentencing. We'll continue the sentencing without date. You'll respond to the motion to dismiss on the ground of denial of speedy trial. We'll brief that and we'll schedule it for sentencing at a later [4] date.

MR. COX: Thank you, your Honor.

(Whereupon, the foregoing proceedings were concluded.)

MONTANA SECOND JUDICIAL DISTRICT,
SILVER BOW COUNTY

No. DC-12-45

THE STATE OF MONTANA, PLAINTIFF,

v.

BRANDON THOMAS BETTERMAN, DEFENDANT.

January 17, 2013.

MINUTE ENTRY

KURT KRUEGER, Presiding Judge

CHRISTINE LIVELY, Court Reporter

This day this cause came on for sentencing hearing. Deputy Attorney Samm Cox, Esq. was present for the State of Montana; The Defendant was present with Counsel Francis P. McGee, Esq. At the outset of the hearing, counsel advised the Court that the Defendant had this day filed a motion to dismiss for lack of speedy trial, and the State requested time to respond to said motion. The Court continued

sentencing in this matter, allowed the State to file a written response to the Defendant's motion, and remanded the Defendant to the custody of the sheriff in lieu of Ten Thousand Dollars ($10,000.00) bail.

MARK THIESZEN
DEPUTY COUNTY ATTORNEY
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(406) 497-6230
Attorney for Plaintiff

MONTANA SECOND JUDICIAL DISTRICT,
SILVER BOW COUNTY

No. DC-12-45

THE STATE OF MONTANA, PLAINTIFF,

v.

BRANDON THOMAS BETTERMAN, DEFENDANT.

January 29, 2013.

STATE'S BRIEF IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS FOR LACK OF SPEEDY TRIAL

COMES NOW the State of Montana and

submits this brief in opposition to Defendant's motion to dismiss for lack of speedy trial. The State asserts that Defendant's motion is without merit. For the reasons stated below, the State urges the District Court to deny Defendant's motion.

FACTS

The Defendant's recitation of the timeline of this case is accurate and could be simpler lined out as:

1.	Complaint filed: (10 days later)	March 5, 2012
2.	Defendant sentenced DC-11-36 to DOC commitment 5 years 2 suspended (17 days later	March 15, 2012
3.	Information in District Court filed: (17 days later)	April 2, 2012
4.	Arraignment and Plea of Guilty (same date)	Apri119, 2012
5.	State filed formal PFO Notice written notice filed after arraignment (8 days later)	April 19, 2012
6.	Defendant files objection to PFO Notice (8 days later)	Apri127, 2012
7.	Written Order for PSI filed (7 days later)	May 3, 2012
8.	State files Motion for Additional Time to respond to Objection (34 days later)	May 10, 2012

9.	State files response to Objection (15 days later)	June 13, 2012
10.	Hearing Held on Defendant's Motion (152 days later)	June 28, 2012
11.	Order Denying Defendant's Motion	November 27, 2012
12.	Order Setting Sentencing Hearing (scheduled for January 17, 2013) (19 days later)	December 28, 2012
13.	Sentencing Hearing Scheduled (same date)	January 17, 2013
14.	Defendant files Motion for Speedy Trial	January 17, 2013

DISCUSSION

The Defendant moves the Court to dismiss the instant matter, on the grounds that the State has violated his United States' Constitution and Montana Constitution right to a speedy trial. The Defendant's motion is without merit.

First the Defendant is correct that the right to speedy trial includes that time up until sentencing. In State v. Payev, 2010 MT 104,356 Mont. 248; 231 P.3d 1104; 2010 Mont. LEXIS 151, the Court noticed that it was necessary to clarify a statement in the Ariegwe decision that "the interval between accusation and trial runs ... to the scheduled trial date or the date on which a plea of guilty is entered, whichever date represents the date of disposition of the case." The Court noted that it was well-settled that a conviction does not occur until sentence is

imposed. (citations omitted). Furthermore, the Court reiterated its decision in State v. Mooney, 2006 MT 121, P 15, 332 Mont. 249, 137 P.3d 532 that held that the right to a speedy trial applies through sentencing.

As a result, the Court noted that a guilty plea does not represent "the date of disposition of the case" but rather up until sentencing As a result, in evaluating the Defendant's motion it is necessary to refer to the Ariegwe decision. In Ariegwe, the Court determined that when analyzing Defendant's right to a speedy trial, the Court must examine (1) the length of the delay, (2) the reason for the delay (3) the Defendant's assertion of his right, and (4) the prejudice to the Defendant. *Barker v. Wingo*, 407 U.S. 514, 530, 92 S.Ct. 2182, 2192, 33 L.Ed. 2d 101, 117 (1972).

In examining the factors outlined in *Barker*, the Montana Supreme Court has stated that no one single factor is decisive in evaluating a speedy trial claim. *State v. Gould*, 273 Mont 207, 214, 902 P.2d 532, 537 (1995). The Court must perform a straight balancing test and a motives test when examining the prejudice caused by the delay. *State v. Longhorn*, 310 Mont 172, 177 49 P.3rd 48, 52 (2002). Upon an examination of each of those factors in this case, particularly the lack of prejudice to the Defendant, the Court must deny Defendant's motion.

(a) LENGTH OF DELAY

When a delay in a speedy trial claim is greater than 200 days the Court must examine the reason for the delay.

The Defendant argues that the total amount of delay is 318 days since the filing of the Complaint thus the Court must examine the reason for the delay. If the delay exceeds 200 days, a presumption of

prejudice attaches and intensifies over time. *Arigwe*, 338 Mont. at 461 citing *Doggett v. United States*, 505 US 647, 112 S.Ct. 2686 (1992). However, the 275 day rule, placing the burden on the State has been abandoned in favor of a balancing test of proof of prejudice from the defendant and proof of absence of prejudice from the State. *Arigwe*, 338 Mont. at 462.

Thus, in the analysis of time alone, there is no longer a bright-line rule of whom the burden lies with when having to prove prejudice or lack of prejudice. The Court needs to determine the length of the delay, and if a further inquiry is necessary. The State concedes that in this matter the length of the delay is over 200 days, and a further analysis is warranted. The State would argue however, that the burden is no longer placed on the State after 275 days to show a lack of prejudice. That burden now lies on both parties to present proof of prejudice or lack thereof.

(b) REASON FOR THE DELAY

If the delay is greater than 200 days the Court must determine the party responsible for the delay and allocate the total delay time between the parties. *Longhorn*, 310 Mont. 172, 177, 49 P.3rd 48, 52 (2002). Delay caused directly by the State as well as institutional delay is attributable to the state. *Good*, 309 Mont. at 118. Institutional delay is accorded less weight in the analysis. *Id.*

In this matter, there is over 318 days of delay, which the Court must examine and allocate among the parties. The State would assert that it is arguable that it is responsible for 76 days of the delay including the time period between the filing of the complaint and the Information (27 days); the period between the Defendant's Objection to PFO and the State's response (49 days).

At the same time, the Defendant is also responsible for some of the delay. Specifically, the State would argue the Defendant is responsible for the delay of 8 days prior to filing the Objection to PFO Notice and the time period after the State responded to such Objection on June 13, 2012 until the hearing on June 28, 2012 (15 days). The State would note during such time period, the Defendant had the opportunity to file a written reply to the State's response and/or request the matter be heard as soon as practicable. The Defendant filed nothing and the matter proceeded to hearing on June 28, 2012.

The State would submit that minus the 49 days attributable to the State and the 23 days attributable to the Defendant, the remainder of the 249 days of delay should be categorized as institutional delay. The Court in Ariegwe, specifically determined that institutional delay is accorded less weight in the analysis. *Id.*

As such, in the instant case, the Defendant must come forward with evidence establishing prejudice, and the State must present evidence establishing the contrary, and the trial Court shall weigh each party's evidence in light of the total amount of the delay. The function of factor two in the overall balancing is no longer to conclusively establish a burden shift for the determination of prejudice. *Arigwe*, 338 Mont. at 470, citing *State v. Haser*, 2001 MT 6, 304 Mont. 63, 20 P.3d 100.

(c) DEFENDANT'S ASSERTION OF HIS RIGHT

Historically, it has been held that if the Defendant asserted his right to speedy trial before the trial date, he or she had timely asserted that

right. See *City of Billings v. Bruce*, 1998 MT 186, 290 Mont. 148, 965 P.2d 866. If the Defendant had asserted his right before the trial date, no further analysis was warranted by the Court. *Id.*

The *Arigwe* Court essentially re-named this prong as, "The Accused's Responses to the Delay". *Arigwe*, 338 Mont. at 471. In *Arigwe*, the Court now determines that a trial Court shall look into the various responses to any delay, i.e. his or her acquiescence in and objections to pretrial delays. *Arigwe*, 338 Mont. at 473. The sum of this evaluation, i.e. the totality of the accused's various responses to the delays in bringing him or her to trial, should then be considered together with the other three factors of the balancing test. *Id.* The accused's various responses to the delays must be evaluated based on the surrounding circumstances, such as timeliness, persistence, and sincerity of the objections, the reasons for the acquiescence, whether the accused was represented by counsel, the accused's pretrial conduct, and so forth. *Id.* at 474 citing *United States v. Loud Hawk*, 474 US 302, 106 S.Ct. 648 (1986).

In the instant case, the Defendant chose to file the Motion for Violation of his Speedy Trial right on the date of sentencing, January 17, 2013. The Defendant argues in essence that the Court took too long in making its determination to deny his objection to the PFO. However, the record does not reflect any assertion of this by the Defendant.

Again, Rules 19 and 22 of the Uniform District Court Rules for the Second Judicial District Court provided the Defendant an avenue to address his concerns. Specifically Rule 19 provides that a motion not rule upon within 45 days shall be deemed denied. However, the Defendant did not make a request for

such a determination. Likewise, had the Defendant been curious in concerns with the Court's decision, Rule 22 also provides that the Defendant and/or his counsel could have filed a reminder of the pendency of such Objection and Motion. Still, the Defendant did not do so, and in evaluating the circumstances of the file, there was really no urgency until the completion of the Pre-Sentence Investigation on October 21, 2012. It is notable that the decision on the motion was within 45 days of the Court's receipt of the presentence investigation.

The Defendant merely did not avail himself of any opportunity to assert his right to speedy trial until the date of sentencing nor brought any notice to the Court of the Defendant's assertion. Rather an evaluation of all the surrounding circumstances should truly reveal the sincerity of the Defendant's objection.

(d) PREJUDICE TO THE DEFENSE.

Prejudice should be assessed in the light of the interests of the defendants which the speedy trial right was designed to protect. *Barker v. Wingo*, 407 US 514, 92 S.Ct. 2182 (1972). Those interests are (1) prevention of oppressive pre-trial incarceration, (2) minimization of the Defendant's anxiety and concern and (3) the avoidance of impairment of the defense. *Wingo*, 407 US at 532. The impairment of the defense is the most important of the three factors to consider because of the impact of the Defendant's ability to receive a fair trial. *Good*, at 309 Mont. at 119.

Prevention of oppressive pre-trial incarcerating.

The Defendant has been incarcerated throughout the pendency of this trial. As of March 15, 2012 in Cause Number DC-11-36, the Defendant

became an inmate in the custody of the Montana Department of Corrections as well. At no time pending the Defendant's motion would he have been released but rather placed in some institution somewhere. While the Defendant was incarcerated pre-trial or pre-sentencing in this matter, he was subject to post trial incarceration in others. There would be no prevention of oppressive pre-trial incarceration here as the Defendant was incarcerated anyways.

Minimization of the Defendant's anxiety and concern.

A certain amount of anxiety and concern are inherent in being charged with a crime; therefore the focus in a speedy trial analysis is how the anxiety is aggravated by the delay. *Longhorn*, 310 Mont. at 181. In the instant case, the anxiety of being charged was eliminated by the Defendant himself when he plead guilty at the time of arraignment. The only anxiety being suffered by the Defendant was whether or not his ploy to avoid treatment as a persistent felony offender was successful or not. As his counsel stated during the arraignment, it was his position that if the Defendant pleads guilty prior to the written notice of persistent felony offender, "I think the State is out of luck at this point in time." Counsel for the Defendant stated that if the Court was going to allow the State to file the notice of persistent felony offender than his client "naturally, [was] going to reserve our right to withdraw the plea and then we'll have to take it up on a writ." Transcript Proceedings, p.8.

Other than awaiting the determination as to the persistent felony offender notice, the Defendant has not expressed to the Court that he suffered any further anxiety and concern. The Defendant without

any support merely asserts in his brief, "defendant suggest that he has undergone concern and anxiety over his future.

Prejudice to the Defense.

The prejudice to the Defendant's defense is the most important factor for the Court to consider because prejudice to the defense goes to the fairness of the entire trial system. *Good*, 309 Mont. at 119. The inquiry into prejudice concerns issues of evidence, witness reliability and the defendant's ability to prepare a defense. *State v. Jefferson*, 315 Mont. 146, 69 P .3d 641 (2003).

The Defendant makes no argument that the delay prejudiced him in this case. The Defendant does not argue that his defense was prejudiced or that he was unable to argue any issues. In the instant case, the Defendant pled guilty at the arraignment and his defense was over. With the exception of his attempt to avoid treatment as a persistent felony offender, the Defendant expressed no other concerns about his future.

Motives Test

As for each factor's relative importance in the overall balancing, the *Arigwe* Court adopted a method of analysis that includes both a "straight balancing test" and a "motives test". *Arigwe*, 338 Mont. at 484 citing *Bruce*. In an examination of the record, the Court must determine that the State has made every attempt to bring the Defendant to trial and sentencing. The the delay is not caused by an improper motive by the State. The delay in this matter was largely caused by the Defendant himself. And although there is some delay on behalf of the State, whether directly or institutional, the Defendant cannot show any improper motive.

CONCLUSION

For the reasons stated above, Defendant's motion to dismiss is without merit. The State urges the District Court to deny such motion.

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MONTANA SECOND JUDICIAL DISTRICT,
SILVER BOW COUNTY

No. DC-12-45

THE STATE OF MONTANA, PLAINTIFF,

v.

BRANDON THOMAS BETTERMAN, DEFENDANT.

May 6, 2013.

MOTION TO RECONSIDER AND SUPPLEMENT TO DEFENDANT'S MOTION TO DISMISS ON SPEEDY TRIAL GROUNDS AND REQUEST FOR HEARING

Comes now the defendant, BRANDON

THOMAS BETTERMAN, hereby moves the Court to reconsider its denial of his motion to dismiss on speedy trial grounds and supplements his motion accordingly with his affidavit and the attachments thereto, Exhibits "A" through "C", inclusive, filed contemporaneously herewith.

Dated: May 6, 2013

/s/ FRANCIS P. McGEE
Attorney for Defendant

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MONTANA SECOND JUDICIAL DISTRICT,
SILVER BOW COUNTY

No. DC-12-45

THE STATE OF MONTANA, PLAINTIFF,

v.

BRANDON THOMAS BETTERMAN, DEFENDANT.

May 6, 2013.

AFFIDAVIT OF DEFENDANT RE: SUPPLEMENT TO DEFENDANT'S MOTION TO DISMISS ON SPEEDY TRIAL GROUNDS

Comes now the defendant, BRANDON THOMAS BETTERMAN, and being first duly sworn,

says upon his oath as follows:

1. I am the defendant in the above entitled action.

2. Pursuant to the Judgment and Order of Commitment DC-11-36, I was sentenced to Five Years with the Department of Corrections with Two years Suspended.

3. I have now spent approximately 442 or more days or more on the sentence in DC-11-36 in the Butte Jail. In theory, I would be eligible for conditional release based on the information available to me if I were in the Department of Corrections actual system.

4. In addition, due to my incarceration in the Butte· Jail as I am informed, I have a warrant out of Stillwater County that I cannot attend to for failure to complete portions of my sentence relating to a DUI in that County.

5. In DC-11-36, I have been ordered to complete a chemical dependency evaluation and follow the evaluator's recommendations, obtain a mental health assessment, and complete Cognitive Principles and Restructuring. This cannot be done in the Butte Jail. I have completed Phase I of the Anger Management Group while in jail. A copy of my certificate is attached as Exhibit "A."

6. I am informed and believe that the previous County Attorney, Mr. Thieszen, requested that Deputy Probation and Parole Officer Jerry Finley to wait to finish the presentence investigation until the court had ruled on my motion to strike the persistent felony offender designation filed after my guilty plea. The date of the report is October 10, 2012. It is unknown what day it was filed with the Court.

7. On March 12, 2013, my attorney received an e-mail from the Court's judicial assistant stating the Court would not be able to "fast track" my case at that time. A copy of that e-mail is attached as Exhibit "B." There is a pending motion to dismiss filed on January 17, 2013, and the State's response filed January 29, 2013. I believe the Court will have to hold a hearing on that issue before I am sentenced and I am requesting a hearing concurrently with the filing of this supplement to my speedy trial motion. If I lose that motion, the time is ripe for sentencing on this cause, DC-12-45, in any event.

For the Court's convenience, my counsel is attaching a copy of the Clerk of Court's Register of Actions as Exhibit "C."

8. I am unable to pay child support and unable to participate in the raising of my son. Obviously, I am not currently employed nor can I continue any schooling. In 15 months, I have only been out for fresh air four times.

9. I have been on emotional roller coaster due to the anxiety and depression caused by the uncertainty and have sought counseling for my mental state with Mr. William Keller.

10. I suffer from high blood pressure as well as stomach and dental problems. I have further issues with a degenerative disk disease which is getting worse and the county refuses to provide medical attention for that.

I declare under penalty of perjury and/or false swearing that the foregoing is true and correct and that this affidavit was executed at the Butte Detention Facility in Silver Bow County, Montana, on May 4, 2013.

/s/ BRANDON THOMAS BETTERMAN

[Logo] Frank McGee <frankmcgeelaw@gmail.com

St. v. Brandon Betterman, DC-12-45
1 message

Tue, Mar 12, 2013 at 9:17 AM

Kennedy, Sherri <skennedy@mt.gov>

To: "Cox, Samm" <scox@bsb.mt.gov>, Frank McGee <frankmcgeelaw@gmail.com>

Samm and Frank,

I talked to the Judge regarding Betterman and he advised me that he and Brett have several civil orders that are pending and will not be able to "fast track" Betterman's case at this time.

Thanks,

Sherri Kennedy
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e-mail: skennedy@mt.gov

MONTANA SECOND JUDICIAL DISTRICT,
SILVER BOW COUNTY

No. DC-12-45

THE STATE OF MONTANA, PLAINTIFF,

v.

BRANDON THOMAS BETTERMAN, DEFENDANT.

June 27, 2013.

TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE KURT KRUEGER, PRESIDING

FOR THE PLAINTIFF:

SAMM COX
CHIEF DEPUTY COUNTY ATTORNEY
155 WEST GRANITE STREET
BUTTE, MONTANA 59701

FOR THE DEFENDANT:

FRANCIS P. MCGEE, ESQ.
125 WEST GRANITE STREET; SUITE 103
BUTTE, MONTANA 59701

[4] (Whereupon, the following proceedings were had.)

THE CLERK: Cause No. DC-12-45, the State of Montana versus Brandon Thomas Betterman.

THE COURT: Mr. Cox.

MR. COX: Your Honor, this is the time set for sentencing in this matter. The defendant had previously entered a plea of guilty to the offenses charged in the Information and the Court had ordered the preparation of a presentence investigation. The State has received that investigation and notes that it was conducted by Probation Officer Jerry Finley who is no longer with the Office of Probation and Parole and would have the Court note that Miss Billteen is present and can testify as to the sentencing matter.

THE COURT: Are you ready to proceed?

MR. McGEE: Yes, your Honor, we are.

THE COURT: Miss Billteen, again, you're under oath from your previous testimony.

THE WITNESS: Okay.

TARA BILLTEEN,

a witness, after having been previously sworn, testified upon her oath as follows:

DIRECT EXAMINATION

BY MR. COX:

Q. Just for the record, will you state your name and [5] your occupation.

A. Tara Billteen. I'm a probation and parole officer for the State of Montana.

Q, And you're not the person who conducted the presentence investigation in this matter either, are you?

A. No.
Q. And do you know who conducted the investigation?
A. Yes.
Q. And who is that?
A. Jerry Finley.
Q, Okay. And is he employed by your office any longer?
A. No.
Q. So in relations to this case, have you had an opportunity to review his investigation?
A. I have.
Q. And how about the steps in which he took in conducting his investigation?
A. He reviewed the defendant's criminal history, his history on supervision, the circumstances of the current offense, and he had an interview with the defendant.
Q. And in relation to this case, is there any pretrial agreement?
A. There's not.
[6] Q. This was an open plea?
A. That's correct.
Q. And in relations to this case, Mr. Finley made a recommendation as far as appropriate disposition?
A. He did.
Q. Did you review that?
A. Yes, he made a recommendation that the defendant be sentenced to Montana State Prison for a period of five years.
Q. And that was in relations to the bail jumping charge; is that correct?
A. Yes.
Q. He also mentioned something as far as whether the defendant would qualify for sentencing under the Persistent Felony Offender statute; is that correct?
A. Yes.
Q. And what was his recommendation should that occur?

A. He recommended the defendant be sentenced to Montana State Prison for a period of seven years.
Q. In relations to sentencing in this matter, does it really matter whether he's qualified as a persistent felony offender because both of those recommendations fall within the realm of the bail jumping charge?
A. That's correct.
Q. However, if the Court were to choose to sentence [7] him as a persistent felony offender, there would be a mandatory minimum?
A. Yes.
Q. So just to clarify his recommendation, do you know whether it's five or seven years?
A. I believe it's five years.
Q. And for that purpose, the Court doesn't even need to adjudicate him as a persistent felony offender?
A. No.
Q. And do you believe that recommendation would be consistent with the nature of the offense that occurred here?
A. I feel it's consistent with the defendant's prior criminal history.
Q. And to your knowledge, has the defendant or was the defendant on supervision or currently serving any other time for any other offenses right now?
A. No. No, excuse me, he had been convicted of felony partner/family member assault, so yes, he is.
Q. So the recommendation here for a five-year commitment to Montana State Prison, which is consecutive to what he's already serving?
A. He did not define further if it was concurrent or consecutive.
Q. Based upon the defendant's criminal history, what [8] would your recommendation be?
A. My recommendation would be consecutive.
Q. And if the Court were to adopt that

recommendation, would it be necessary to order any or set forth any conditions of supervision for probation?
A. No.
Q. And although some are outlined here, those would only be if the Court chose to suspend a portion of that sentence?
A. That's correct.

MR. COX: I have no further questions, your Honor.

THE COURT: Mr. McGee.

MR. McGEE: Thank you, your Honor.

CROSS-EXAMINATION
BY MR. MCGEE:
Q. Miss Billteen, let me refer you to page 2 of the report. On the bottom, there's an entry, September 13, 1997, Criminal Possession of Dangerous Drugs and Theft, $300 fine, 5 days, 5 years MSP suspended. Do you see that?
A. I do.
Q. And going to page 2 on January 8th, two thousand strike that -- November 14th, 2005, it shows Theft and Criminal Possession of Drug Paraphernalia, 5 years [9] MSP suspended, $300 fine, 5 days.
A. That's correct.
Q. Is that the same case? Isn't that the same case as the one on the first page?
A. I don't know.
Q. Do you know whether Mr. Finley checked that out to see whether or not that was the same case or not?
A. I don't know.
Q. So if that was, that would be one less felony based on that rap sheet, wouldn't it?
A. It would.
Q. And that might color your thinking with respect to a recommendation?
A. No.

Q. Have you ever talked to Mr. Betterman?
A. I have. I supervised him.
Q. You have talked to him before?
A. In the past, for a short time, yes, I did.
Q. Okay. And how long ago was that?
A. When I first started, so it would have been -- I don't have an exact date. I'm sorry.
Q. Well, what year approximately?
A. I would say probably 2010.
Q. Now, in this particular case, were you aware of the underlying case where it gave rise to bail jumping?
[10] A. The partner/family member assault case?
Q. Yes.
A. Yes.
Q. And do you know what the recommendation had been in that case?
A. I do not.
Q. Are you aware of how long it took between the time that was set for sentencing and the time Mr. Betterman ended up being either apprehended or surrendering himself. That would be in the underlying case.
A. It was December 9th, 2011, when he failed to show up, and he turned himself in on February 9th, 2012.
Q. He turned himself in?
A. That's correct.
Q. He walked into the jail, Butte-Silver Bow Jail?
A. Yeah, I would assume.
Q. Did you review any of this report of Mr. Finley's with Mr. Betterman at all?
A. No.
Q. Have you contacted any personnel in the jail to see what he had been doing for the last five hundred and some odd days--
A. No.
Q. --as far as taking chemical dependency or mental health?

[11] A. I haven't. I found out about this this morning, so I've done no work on the presentence investigation.

MR. MCGEE: Okay. I've got nothing further, your Honor.

REDIRECT EXAMINATION

BY MR. COX:

Q. Just in relations to credit for time served, do you have any calculation as far as approximate days that he's served?

A. I have the date he was incarcerated, which was February 9th of 2012. He has been incarcerated since that date.

MR. COX: I have no further questions, your Honor.

MR. McGEE: Nothing further.

THE COURT: You may step down. Thank you.

MR. COX: Your Honor, the State has no further witnesses either.

THE COURT: Do you have any witnesses?

MR. McGEE: Yes, your Honor. I would call the defendant, Brandon Betterman.

[12] BRANDON BETTERMAN,

a witness, after having been first duly sworn, testified upon his oath as follows:

DIRECT EXAMINATION

BY MR. McGEE:

Q. Mr. Betterman, how long have you been in custody now?

A. I believe about 505 days.

Q. And I wanted to go through a couple of things in the PSI. When Mr. Finley wrote this, under Chemical Use, the first thing he says, the defendant described his alcohol use as rare. Did you ever tell Mr. Finley that?

A. No. In fact, I told him the opposite, I've had a chemical abuse problem.

Q. Can you describe for the Court your history of chemical abuse.
A. When I was younger, I was into marijuana, drinking, and methamphetamines. Twelve years ago, I stopped doing methamphetamines, stopped everything, really, for about four years, five years. As things progressed, I started drinking and then it escalated into binge drinking and pretty soon, it became a thing where I was drinking every day all day, having withdrawal, trying to get off of it, went from your [13] normal beer on to liquor and considerable amount of liquor at the end.
Q. Mr. Finley also indicated that there was a Federal PSI that indicated you started drinking at age 12. Would that be correct?
A. Yeah.
Q. Okay. Did you also end up being in Rivendell at some point in time?
A. When I was 13, I was in Rivendell at Billings, yes.
Q. And why were you there?
A. For behavioral problems for the most part.
Q. Since you've been in custody, have you availed yourself of any of the programs in the jail?
A. I have. I went through two courses of the chemical dependency and completed both of them. I completed the anger management course with the Western Montana Mental Health. I've got on some anxiety pills and whatnot and done a lot of hard work with Bill Keller and Kathy Davis in the mental health.

MR. McGEE: May I approach, your Honor?

THE COURT: You may.

Q. (By Mr. McGee) I'm going to show you a document which says Congratulations.
A. Yes.
[14] Q. Do you have the original of that document?
A. Yes.
Q. And is that a correct copy of it?

A. It is.
Q. And it's from the Butte Chemical -- strike that. Completing Phase One Anger Management Group; is that correct?
A. It is.

MR. McGEE: May I have this marked, your Honor?

THE COURT: You may.

MR. McGEE: May I approach, your Honor?

THE COURT: You may.

MR. McGEE: I would move admission of that document, your Honor.

THE COURT: Any objection?

MR. COX: No, your Honor.

THE COURT: The same is hereby admitted.

Q. (By Mr. McGee) Do you plan on continuing one place or another as far as treatment is concerned for alcohol and substance abuse?
A. Yes, I would like to I would like to be regular in Alcoholic Anonymous and continue on with my sobriety.
Q. If the Court were to suspend some portion of your sentence and you were to be at some point released, would you intend on doing that one way or another?
[15] A. Yes, I would.
Q. And if the Court obviously required you, you would have to do that; is that correct?
A. Yes.
Q. And you also have a case pending in Columbus; is that correct?
A. Yes, it is.
Q. And that is what, a DUI as well?
A. Yeah, it was a first DUI that I had received on May 11.
Q. And you were supposed to basically do an alcohol class for that; is that correct?
A. I did the Prime for Life Class. I completed that and

they recommended an outpatient aftercare once a week at the Alpha House there in Billings.
Q. And you got arrested for this or you went to jail on this charge, I gather, so you were not able to complete what you were supposed to do; is that correct?
A. Yeah, I was unable to complete that.
Q. And there's a warrant for you out of Columbus; is that correct?
A. There is for revocation yeah.
MR. McGEE: Your Honor, I don't think I can add any more. Thank you.
THE COURT: Mr. Cox.
[16] CROSS-EXAMINATION
BY MR. COX:
Q. How many treatment programs have you went through?
A. I believe 4 and the last one being when I was 23 in South Dakota.
Q. And after those programs, did you then use more alcohol?
A. After a bit, yes.
Q. And when you say a bit, how long?
A. It depends. The last time I did, I was actually incarcerated so there was no use of alcohol until I got out, and I had a total of probably about four years.
Q. In relation to this case, you indicated to Mr. Finley that the reason you didn't show up for sentencing is because you were using alcohol; is that correct?
A. Yes.
Q. Were you on probation at that time?
A. No.
Q. You weren't being supervised or anything of that nature?
A. No.
Q. Is this the longest period of sobriety you've had?
A. No.
Q. No. How long was it?

A. I'm not sure exactly but well over 60 months.
[17] Q. And what program did you attend prior to that period of sobriety?
A. I got incarcerated at the beginning of my supervision period. After that, I was sober.
Q. You've got a lengthy criminal history; would you agree with that?
A. Yeah.
Q. There's some pretty serious and violent offenses in there as well; is that correct?
A. I believe there is one.
Q. Well, you've got, it says here, a couple Partner/Family Member assaults and an aggravated assault with intent?
A. I've got an aggravated assault and I think one partner/family member.
Q. As far as your criminal history here goes, is there some reason the Court shouldn't incarcerate you?
A. Well, I got sentenced here March 15th last year, and one thing that the Judge said to me was obviously, I have to take things seriously. He was right.

THE COURT: I'm sorry, I didn't hear what you just said.

THE WITNESS: On March 15th last year, you told me that I have to take it seriously. That's something I've thought about extensively. And he was absolutely [18] right. I have in this past 500 days.

I would like to say I've changed. I would like to say that everything in my whole life has changed for the better. Right now, I can say that from right here.

I also understand that I haven't had a chance for the temptations on the street. Given that chance, I do believe I can succeed. I've got -- I've finally got a chance with my son that I haven't had in the last three years.

My father retired. He's in his golden years. He's my best friend in the world. I'm sick of -- coming to jail saved my life. I'll admit that.

My health problems have been terrible because of the use of alcohol, and for the first time that I can actually be honest with myself and feel that I can do something with myself and have a legitimate plan that's actually achievable, which is going back to school. I would like to get a marketing degree and further my education.

Q. If the Judge recommends anything other than incarceration, what guarantees does he have that you won't do what you've done in the past?

A. The only thing I have that I can say is my word, and I understand in the past, it hasn't been good. I do feel that I've matured. I feel I can give you my word [19] and hopefully, you know, this jail that I have been in, I've been no trouble. I want to make the better and the best of myself that I can finally make something for my son. He deserves me, and I'm not there for him at all.

MR. COX: I have no further questions, your Honor.

THE COURT: Any additional questions?

REDIRECT EXAMINATION

BY MR. McGEE:

Q. How old are you now, Mr. Betterman?

A. I'm 34.

Q. Basically what you're telling the Court is it's time to grow up?

A. Past time, yeah.

MR. McGEE: Nothing further, your Honor.

THE COURT: You may step down.

Anything further?

MR. McGEE: I have no further witnesses, your Honor.

THE COURT: Mr. Cox.

MR. COX: Your Honor, in relation to this case, as the Court is aware, after failing to show up, the defendant and his counsel appeared here at the arraignment and pled guilty right away. There's no doubt in anybody's mind and it's on record that the [20] reason they did that was to avoid the persistent felony offender. This Court made a ruling that that is applicable to him, and you can't just avoid the fact that you have this lengthy criminal history and enter a plea of guilty. But regardless of whether he qualifies as a persistent felony offender or not, the recommended sentence here is within the realm of the maximum sentence allowed for bail jumping anyway.

The defendant may be sincere after 505 days of sobriety in relations to his desire to change, but if you look at the criminal history, the probabilities of that right now aren't great. I know that he has some goals and some opportunities with his family, with his child, and those should push him towards becoming a better member of the community, but he's a pretty serious risk right now.

His criminal history, not involved with just alcohol, but it involves violence. And those two may go hand in hand. Maybe he drinks when he gets violent or violent when he gets drunk, but what he basically told the Court is this and the previous incarceration are his most longest periods of sobriety.

He's been on supervision before. He's not been successful at it. It's a difficult decision, your Honor. I don't know if Mr. Finley and the direct five [21] years at Montana State Prison is the best opportunity. I do believe that he does need some type of incarceration, but the Montana State Prison -- and I'm sure Mr. McGee will say this, he's got more, better opportunity to become what he was in the past and that basically is, if you look at his history, criminal.

So we would ask the Court to adopt some type of sentence that takes into effect that he's done the 505 days here; that he seems sincere at this particular time but that, you know, he gets some form, some sort of treatment for not only the--

THE COURT: Excuse me just a second.

I'm sorry, continue.

MR. COX: We ask the Court to adopt this type of sentence which will take into the fact his criminal history that will put him into programs right now that he can better himself. So we have no opposition looking at the defendant on the stand and watching him do a lengthy tail. I know that he's failed in the past. Hopefully, he has the right motivation at this particular time.

The caveat to that would be is if the Court were to sentence him to a longer period of time, you know, the next time he just goes to prison, he goes to prison for a long time because he definitely deserves that looking [22] at his criminal history, and that's what we ask of the Court at this time.

MR. McGEE: I think, your Honor, the thing that starts this moving in Mr. Betterman's favor is the fact that he turned himself in and he wasn't -- he was gone for a couple of months but he didn't exactly come flying out of the courtroom or he didn't disappear for a year or two. He came back on his own and he came out of his drunken stupor, for lack of a better description, and he came back on his own. And he's done his time.

As the Court did point out to him, the original underlying agreement had been a five-year DOC commitment with four suspended. Your Honor indicated to him that this was not like a grocery store where you can pick and choose what you want to do and when you want to come and go, and you gave him three years to do at a time and then suspended two.

So in one sense, he's been punished for not showing up a little bit already, and I would suggest to you that the fact that he hasn't been able to seek parole or have -- undergo the programs that maybe would be necessary for him to be released under the underlying sentence are perhaps almost punishment enough; that he be allowed to complete whatever he needs to do with DOC on the underlying case and then as Mr. Cox pointed out give him [23] a nice long tail to prove himself and to indicate that he's actually going to be able to do it.

I think he's sincere. He said it best. He said it's easy. I'm in here. When I get on the street, there's a whole different issue. I'm going to have to really work hard at it.

So I think Mr. Betterman has got it figured out. He's 34 years old now. He's not a 25 year old going on 12, and he's got to get a handle on it. Obviously anger management issue with respect to the PFMAs. He was intoxicated when those happened. And it just flows naturally, keeps on coming.

And I think the Court has seen it a million times. As I say, I think once Jim Beam starts talking, things go haywire. And Mr. Betterman is just going to have to try and stay sober. If he doesn't, as Mr. Cox pointed out, he's going to do a long stretch somewhere.

So I submit to the Court that I'm sure the Court can fashion something. I think I would request as well the Court to consider as well giving him some credit for the time he's served even though he was serving also the underlying sentence in our county jail, because he did plead guilty, as Mr. Cox indicates, to avoid the PFO, but he also pleaded guilty because, in fact, he was guilty. He didn't have a defense. So at some point in [24] time, he did that in the early stage

of the proceedings and I think he deserves some credit for that.

And I think, quite frankly, the Court can fashion an appropriate sentence without a long, long term in custody because I don't think that's going to solve any problems here. I think Mr. Betterman is going to have to solve his own problems and I think he's going to have to test the waters on the street at some point in time and I think probably the sooner the better.

Thank you, your Honor.

THE COURT: We'll take a break for a second. I would like to see counsel, please.

(Whereupon, a brief recess was taken.)

THE COURT: Anything further?

MR. McGEE: No, your Honor.

MR. COX: Nothing from the State, your Honor.

THE COURT: Would the defendant please stand. It's the judgment of this Court for the felony offense of bail jumping, that the defendant the Court hereby sentences the defendant to seven years in the Montana State Prison with four of those years to be hereby suspended. This sentence will run consecutive to the sentence that he's currently serving.

That during any time period of a suspended sentence, that the defendant shall be placed under the supervision [25] of the Department of Corrections subject to all the rules and regulations of Adult Probation & Parole Bureau. The defendant shall be supervised at any level of supervision.

The defendant must obtain prior approval from his supervising officer before taking up residence in any location. The defendant must obtain permission from his supervising officer or the officer's designee before leaving his assigned district.

The defendant must seek and maintain employment or maintain a program approved by the

Board of Pardons and Parole. The defendant must submit written monthly reports to his supervising officer. The defendant's prohibited from using, owning, possessing, transferring and controlling any firearm. The defendant must obtain permission from his supervising officer before engaging in any business.

The defendant has -- upon reasonable suspicion the defendant has violated conditions of supervision, the probation and parole officer may search the person's vehicle or residence of the defendant and the defendant must submit to the search. The defendant must comply with all municipal, county, state and federal laws and conduct himself as a good citizen.

The defendant must be cooperative and truthful in [26] his communications and dealing with probation and parole officer. The defendant is prohibited from using or possessing alcoholic beverages or illegal drugs. The defendant is required to submit to bodily testing for drugs and alcohol on a random basis.

The defendant is prohibited from gambling. The defendant shall pay fees and restitution as ordered by the sentencing court; a surcharge of $20 for each felony offense, a surcharge for the Witness Advocacy Program of $50, $10 per count for technology fee.

The defendant must submit to DNA testing as required by statute. The defendant must -- shall not possess or use any electronic device or scanner capable of listening to law enforcement.

The defendant shall abide by a curfew as determined necessary and appropriate by the Probation & Parole Officer. The defendant will not enter any bars. The defendant will not enter any casinos. The defendant will not associate with any

probationers, parolees, prison inmates or persons in the custody. The defendant will attend self-help meetings at the direction of the Probation & Parole officer.

The defendant will advise all medical personnel of his addiction history. The defendant will enter and complete Anger Management class to assist him in dealing [27] with his violent criminal behaviors. The defendant shall successfully complete Cognitive Principles & Restructuring, or similar cognitive and behavioral modification program.

The defendant shall obtain a chemical dependency evaluation by a state approved evaluator. The defendant shall obtain a mental health evaluation by a state approved evaluator. The defendant is prohibited from obtaining a medical marijuana card. The defendant shall pay all fees and restitution as ordered by the sentencing court.

The defendant shall complete the statutorily required evaluation treatment for PFMA convictions. The defendant has 120 days from today's date to review my written judgment -- to review my written judgment to see if it complies with my oral judgment in this matter. And that will be the judgment of this court.

MR. McGEE: Your Honor, you're not giving him credit for time served, I don't believe; is that correct?

THE COURT: Counsel, would you approach the bench.

(Whereupon, a brief discussion was held at the bench.)

THE COURT: No, the Court is not giving him [28] credit for time served.

MR. McGEE: The record may reflect that we requested it, though?

THE COURT: Yes.

MR. McGEE: Thank you, your Honor.

THE COURT: The Court would note that the time served was on another matter.

MR. McGEE: Thank you, your Honor.

(Whereupon, the foregoing proceedings were concluded.)

MONTANA SECOND JUDICIAL DISTRICT,
SILVER BOW COUNTY

No. DC-12-45

THE STATE OF MONTANA, PLAINTIFF,

v.

BRANDON THOMAS BETTERMAN, DEFENDANT.

June 27, 2013.

MINUTE ENTRY

KURT KRUEGER, Presiding Judge
CHRIS LIVELY, Court Reporter

This day this cause came on for sentencing hearing. Deputy County Attorney Samm Cox, Esq. was present for the State of Montana; the Defendant was present with Counsel Francis McGee, Esq. Thereupon, the Court heard testimony from Adult Probation and Parole Office Tara Billteen, from the Defendant and oral argument from counsel. At the

conclusion thereof, the Court sentenced the Defendant to the custody of Department of Corrections for a period of seven (7) years with four (4) years suspended.

The Court did **not** awarded the Defendant credit for time served, since that was on another case, advised the Defendant of his right to apply for sentence review, ordered the Defendant remanded him to the custody of the sheriff for transfer to the Department of Corrections.

MONTANA SECOND JUDICIAL DISTRICT,
SILVER BOW COUNTY

No. DC-12-45

THE STATE OF MONTANA, PLAINTIFF,

v.

BRANDON THOMAS BETTERMAN, DEFENDANT.

July 9, 2013.

JUDGMENT

This matter came before the Court on the 27th day of June, 2013, with the Honorable Kurt Krueger presiding. The Defendant, BRANDON BETTERMAN, was present and was represented by his counsel, Frank McGee. Deputy County Attorney Samm Cox represented the State. This was the time set for sentencing.

The Court noted that the Defendant had previously appeared before the Court at arraignment and entered a plea of guilty to the felony offense of BAIL JUMPING as set forth in the Information. At

such time, the. Court had advised the Defendant of the charge, the maximum possible penalties, his rights, and the consequences of pleading guilty. The Defendant indicated he was aware a guilty plea would constitute a waiver of his trial rights, his right of appeal and any factual defenses. The Court determined the Defendant was acting knowingly and voluntarily and that he was aware the Court was not bound by the pre-trial agreement. The Defendant then entered a guilty plea to the offense as stated in the Information. The Court accepted such plea such plea and ordered a presentence investigation.

At the outset of the June 27th hearing, the parties indicated that they had received a copy of the pre-sentence investigation and had no material changes, additions or deletions to it. In questioning, the Defendant contested a previous felony conviction out of Yellowstone County for THEFT and that it was included twice in the Criminal History section of the pre-sentence investigation.

The Court then heard testimony from the Tara Billteen in place of Jerry Finley the person responsible for preparing the pre-sentence investigator. Billteen testified as to the Defendant's extensive previous criminal record, the Defendant's chemical dependency issues and his history of violent offenses. Billteen then testified that she was in agreement with the recommended sentence contained in the pre-sentence investigation where Finley recommended a five (5) year sentence to Montana State Prison consecutive to that the Defendant was currently serving. The parties then made argument to the Court.

Therefore based upon the pre-sentence investigation, the recommendation of the parties and

the entire record,

IT IS THE JUDGMENT OF THIS COURT that the Defendant, BRANDON BETTERMAN, is guilty of the felony offense of BAIL JUMPING as such offense is charged in the Information.

IT IS THE DECISION OF THIS COURT that despite its previous order indicating the State could seek designation of the Defendant as a Persistent Felony Offender, the Court will not do so at this time.

INSTEAD, IT IS THE DECISION OF THIS COURT that for the offense of BAIL JUMPING, the Defendant shall be sentenced to the custody of Montana State Prison, for a period of seven (7) years with three (3) years of such sentence suspended upon the terms and conditions outlined below.

IT IS ALSO THE DETERMINATION OF THIS COURT that the Defendant's pre-trial incarceration was in relation to the underlying conviction for PARTNER OR FAMILY MEMBER ASSAULT and as such, the Defendant shall not receive any credit for time served in the Butte- Silver Bow County Jail.

IT IS ORDERED THAT DURING THE PERIOD OF SUSPENSION, the Defendant shall abide by the following terms and conditions of supervision:

1. The Defendant shall be placed under the supervision of the Department of Corrections, subject to all rules and regulations of the Adult Probation & Parole Bureau.

2. The Defendant must obtain prior approval from his/her supervising officer before taking up residence in any location. The offender shall not change his/her place of residence without first obtaining written permission from his/her

supervising officer or the officer's designee. The offender must make the residence open and available to an officer for a home visit or for a search upon reasonable suspicion. The offender will not own dangerous or vicious animals and will not use any device that would hinder an officer from visiting or searching the residence.

3. The Defendant must obtain permission from his/her supervising officer or the officer's designee before leaving his/her assigned district.

4. The Defendant must seek and maintain employment or maintain a program approved by the Board of Pardons and Parole or the supervising officer. Unless otherwise directed by his/her supervising officer, the offender must inform his/her employer and any other person or entity, as determined by the supervising officer, of his/her status on probation, parole, or other community supervision.

5. Unless otherwise directed, the Defendant must submit written monthly reports to his/her supervising officer on forms provided by the probation and parole bureau. The offender must personally contact his/her supervising officer or designee when directed by the officer.

6. The Defendant is prohibited from using, owning, possessing, transferring, or controlling any firearm, ammunition (including black powder), weapon, or chemical agent such as oleoresin capsicum or pepper spray.

7. The Defendant must obtain permission from his/her supervising officer before engaging in a business, purchasing real property, purchasing an automobile, or incurring a debt.

8. Upon reasonable suspicion that the offender has violated the conditions of supervision, a probation and parole officer may search the person, vehicle, and residence of the offender, and the offender must submit to such search. A probation and parole officer may authorize a law enforcement agency to conduct a search, provided the probation and parole officer determines reasonable suspicion exists that the offender has violated the conditions of supervision.

9. The Defendant must comply with all municipal, county, state, and federal laws and ordinances and shall conduct himself/herself as a good citizen. The offender is required, within 72 hours, to report any arrest or contact with law enforcement to his/her supervising officer or designee. The offender must be cooperative and truthful in all communications and dealings with any probation and parole officer and with any law enforcement agency.

10. The Defendant is prohibited from using or possessing alcoholic beverages and illegal drugs. The offender is required to submit to bodily fluid testing for drugs or alcohol on a random or routine basis and without reasonable suspicion.

11. All Defendants convicted of a felony offense must submit to DNA testing as required by §44-6-103, MCA.

12. The Defendant shall obtain a chemical dependency evaluation by a state approved evaluator. The Defendant must pay for the evaluation and follow all of the evaluator's treatment recommendations.

13. The Defendant shall obtain a mental health evaluation/assessment by a state approved evaluator. The Defendant must pay for the evaluation and

follow all of the evaluator's treatment recommendations.

14. The Defendant shall successfully complete Cognitive Principles & Restructuring (CP&R) or similar cognitive and behavioral modification program.

15. The Defendant shall not possess or use any electronic device or scanner capable of listening to law enforcement communications.

16. The Defendant will abide by a curfew as determined necessary and appropriate by the Probation & Parole Officer.

17. The Defendant will complete any community service ordered by the court or the Probation & Parole Officer.

18. The Defendant will not enter any bars.

19. The Defendant will not enter any casinos.

20. The Defendant will not associate with probationers, parolees, prison inmates, or persons in the custody of any law enforcement agency without prior approval from the Probation & Parole Officer. The Defendant will not associate with persons as ordered by the court or BOPP.

21. The Defendant will attend self-help meetings at the direction of the Probation & Parole Officer.

22. The use of marijuana would be detrimental to the Defendant's rehabilitation and to the safety of the community. The Defendant is prohibited from obtaining a medical marijuana registry card without prior authorization of the Court.

23. The Defendant shall comply with all

sanctions given as a result of an intervention, onsite (preliminary), or disciplinary hearings.

24. The PSI report shall be released by the Department to certain persons, such as treatment providers, mental health providers, and/or medical providers as needed for the Defendant's rehabilitation.

IT IS FURTHER ORDERED that this sentence shall run consecutively to that which the Defendant is currently serving time after being convicted of the felony offense of PARTNER FAMILY MEMBER ASSAULT.

The Defendant was sentenced to a term of incarceration based upon his criminal history, the nature of this offense and the Defendant's prospects for rehabilitation. The Court notes that while the Defendant may have eventually turned himself in, the Defendant blatantly refused the direction of this Court and absconded without little concern about the consequences of his actions. The Court, however, does note that the Defendant is in desperate need for further chemical dependency treatment and hopes that the Defendant will avail himself of such programming at Montana State Prison.

The Defendant was advised that he has 120 days within which to contest any written terms of this Judgment that conflict with the Court's oral imposition of sentence. Failure to do so within that time period shall constitute a waiver of such right.

Finally the Defendant was advised of his rights pursuant to the Montana Sentence Review Act.

DONE and DATED this 9 day of July, 2013